THE CONVEYANCER
AND
PROPERTY LAWYER

VOL. 2, No. 2. DECEMBER, 1937

CONVEYANCER'S NOTEBOOK.

Extinguishment of tithe annuities.—Rules have now been made for the extinguishment or reduction of an annuity : S. R. & O. 1937/557. Under paragraph 1 somewhat complicated provisions are made for ascertaining the amount of the consideration money to be paid for the redemption of the annuity. The appropriate authority ascertains the sums which would have to be paid in respect of the annuity after the redemption date including any allowance in respect of a wholly agricultural holding under section 14 of the Act, and each sum is to be reduced by three per cent. for the costs of collection, and each sum is to be discounted in respect of the period between the redemption and the date when it would have been payable at the rate of interest fixed for some Government security which the Treasury think appropriate. There is power on the part of the appropriate authority or the landowner to require that two or more annuities shall be redeemed together for an aggregate sum.

Paragraph 2 provides for a notice by the appropriate authority fixing the dates of payment by instalments.

Paragraph 3 provides that an application to the appropriate authority to notify the consideration money shall contain such particulars in regard to the land and the annuity as the appropriate authority shall require.

Paragraph 4 enables a landowner by the payment of a capital sum of not less than £25 to obtain reduction of the redemption annuity. The principle of this reduction is to ascertain what

amount of tithe redemption annuity would be redeemed by such a capital sum at the time of payment and then reduce the actual tithe redemption annuity by subtracting the sum so ascertained.

Restrictive covenants and leases of registered land.—The decision in *White* v. *Bijou Mansions*, [1937] Ch. 610, noted *ante*, p. 69, is continuing to worry practitioners. Where a new lease is granted the existence of restrictive covenants affecting the lessor's title does not afford any very great obstacle to intending lessees in most cases. He can search.

Where, however, the question affects purchasers of an existing lease the problem is not so simple. The vendor cannot authorise a search of the lessor's title, and it is not likely that the average lessor will consent on a mere assignment of a lease. At the same time it is clear that many purchasers may be concerned to see that there are no restrictive covenants affecting the land which are not contained in the sub-lease supposing that they contemplate some change in the user of the premises. In this respect the Land Registration Act is even harsher than the Land Charges Act, because at least the Land Charges Register is open to inspection if the lessors' names are available. In fact, of course, the Land Registration Act should destroy the anomalies of the old system, not enhance them.

Two observations may be offered. First, when a new lease is registered the solicitor applying for first registration should always apply for an absolute title. This has been done successfully and there seems to be no reason why it should not be granted as a matter of course when the lessor is registered with an absolute title. In such circumstances any entries affecting the registered land will be incorporated in the leasehold title and so will become obvious to any purchaser from the lessee, or will not be binding upon him or the subject-matter of compensation under the Act, as the case may be. It is thought that the decision above referred to may have the effect materially of altering the practice on the grant of leasehold titles, if practitioners will regard it with sufficient attention.

Secondly, although a purchaser of an existing lease is not entitled to inspect the title in reversion, inspection of the Index of Parcels should show whether or not the freehold is registered. In the event of it being registered, it is submitted that the Registrar should be able to say whether there are any restrictive covenants registered against the freehold that are not contained in the lease.

As far as the writer knows there is no provision for this in the Act or Rules and, consequently, a purchaser is not entitled to this information, but in the interests of registration there seems to be no reason why it should not be provided in return, perhaps, for a reasonable search fee. This does not render the Register itself public, which appears to be open to objection. It merely enables an official familiar with the contents of the Register to answer a question, not directly affecting title, which is very material to his transaction. It is suggested with all deference that there is good ground for amending the rules to allow for this contingency. The rule might well permit the disclosure of all entries affecting the user of the land, as distinct from matters of title, such as charges, which appear on the reversioner's register but have been omitted from one cause or another from the leasehold title.

Land Registry—Official Searches on Building Estates.—The earnestness of the Chief Land Registry to facilitate the work of practitioners is evidenced once more by a further modification of the rules relating to official searches set out in the communication below received from the Land Registry.

1. The Chief Land Registrar wishes to draw the attention of solicitors to the following optional modification in the practice regarding official searches in Form 94 affecting unfenced plots on a building estate.

Hitherto it has been necessary to define such plots by means of a plan *in duplicate* so that the Registry may retain one copy for the purpose of record in the Registry and issue the duplicate with the certificate of the result of the search.

Many solicitors are anxious to avoid the expense of preparing the *duplicate* plan and do not require it to enable them to identify the plot concerned when the certificate of the result of the search is issued to them. They are satisfied, therefore, if the certificate of the result of the search is issued to them without the duplicate plan being annexed thereto.

The Chief Land Registrar has therefore directed that if in future no *duplicate* plan accompanies an application for an official search in Form 94, the application should not be refused on that ground but that the search should be made and the certificate of the result issued without a plan being attached thereto. It will be assumed that this is what the solicitors who do not supply the plan in duplicate desire.

2. In this connection solicitors are reminded that if the vendors of a building estate choose for the purpose of facilitating the identification of plots on Form 94 to deposit at the Land Registry a copy of the Estate Plan in duplicate with the plot numbers set out thereon, the Registry is prepared to approve the estate plan so deposited and to issue the duplicate plan officially stamped by the Registry as having been approved for reference on Form 94 for the purpose of identifying plots thereon and so save purchasers the cost of having to prepare plans to attach to Form 94.

Purchasers, if relying on a plot number for the description of the land, should see that the estate plan in the possession of the vendors is officially stamped by the Land Registry as having been approved for use on Form 94 otherwise the application for the search must be rejected as the Registry cannot identify the plot concerned.

It may be a convenience for some practitioners not familiar with Land Registry work to offer some comment. It is obviously a saving of time and expense to solicitors to prepare only one, instead of two plans for official searches, and official searches should always be made in the case of registered land, because of the protection against intermediate dealings offered by them. At the same time it is obvious that an official search against a plot on a building estate may be quite sufficient to identify the property for the benefit of the solicitor making the search, since he has prepared the plan lodged at the Registry, but may not contain the necessary details to satisfy another solicitor. If the purchaser alone is concerned with the transaction this is immaterial, because official searches do not play the same part in registered conveyancing as they do in unregistered conveyancing. Charges, which in unregistered conveyancing are registered against the name of the owner of the property under the Land Charges Act, are registered against the land itself on the Register under the Land Registration Act. Hence, in the case of registered land, there is no necessity to produce official searches made in prior transactions. In unregistered land the official search is produced to satisfy a purchaser that there was no charge registered against a prior owner after 1925, but this is immaterial in registered conveyancing. Consequently, as has been said, where only a purchaser is concerned there appears to be no reason why his solicitor should prepare more than one plan.

Where the purchaser is also charging his interest at the time of purchase it is obviously necessary that the official search should satisfy the mortgagee's solicitor as well. In this case, the identity

of the property as disclosed by the search form becomes material. It is suggested that an arrangement could be made whereby the search form prepared by the purchaser's solicitor could be submitted to the mortgagee's solicitor for forwarding to the Registry. This, however, appears to be a matter of arrangement.

In the circumstances mentioned the advantages to be obtained by filing a copy of the estate plan with numbered plots and for the use of an official duplicate is obvious. The danger of this method lies in possible changes of estate plans after they have been filed. Solicitors are not always kept aware by their clients of these changes and mistakes then may occur. Purchasers must be warned to see that any plan so adopted does correspond with the actual land purchased and, if this is not the case, to ask that the vendors will obtain a resurvey by the Land Registry, a very simple matter, before completion of the purchase and before submitting the official search.

Rentcharges — Registration under the Companies Act. — A difficult problem has been submitted by certain correspondents in connection with the grant of perpetual rentcharges by companies registered under the Companies Act on conveyance of freehold land. The problem seems capable only of resolution by legislation or direct judicial decision, but it was hoped to write a note upon it for this issue, until it was learned that a provincial Law Society has decided to inquire into the matter about the time of going to press. In these circumstances it has been thought best to leave the matter without further comment for the moment.

Registration of sub-contracts for sale of land.—A correspondent writes as follows :—

" A contracts to sell Blackacre to B, and B, before he has taken up a conveyance from A, enters into a sub-contract for the sale of Blackacre to C. If C wishes to register his sub-contract as a Land Charge Class C (iv) (Estate Contract) should he effect the registration against B, with whom the sub-contract was made, or against A the estate owner?

" These sub-contracts are common on rapidly developing building estates, and can undoubtedly be validly registered, since the Land Charges Act, 1925, s. 10 (1) (c) (iv) refers to " any contract by an estate owner or *by a person entitled at the date of the contract to have a legal estate conveyed to him* to convey or create a legal estate ". In my experience these sub-contracts (the registration of which is quite usual) are invariably registered

by the sub-purchaser against his own vendor and not against the estate owner. I submit that this is wrong, and that the registration should be effected against the estate owner. Section 10 (2) of the Land Charges Act, 1925, states that "a land charge shall be registered in the name of the estate owner", and section 205 (v) of the Law of Property Act, 1925, defines "estate owner" as "the owner of a legal estate". As the sub-purchaser's vendor is not the owner of a legal estate, it appears clear that the sub-contract cannot be registered against him, but must be registered against the original vendor, since he is the estate owner."

It is difficult to avoid the force of the reasoning behind the view expressed by our correspondent. The difficulty, that is inherent, is in the registration of a land charge against a name and not against the land itself. It might be pointed out that section 10 (2) refers to the estate owner whose estate is intended to be affected. Primarily it is the interest of the vendor that is intended to be affected, but, of course, he is not an estate owner. If the estate contract is registered only against the original vendor and the sub-vendor then takes a conveyance to himself and conveys to a third party, is the third party protected? It is submitted that he is not. On investigation of title the third party should either see the official search of his vendor, which would in the circumstances disclose the sub-contract, or else search against the original vendor whose name appears on the abstract, in which case again the sub-contract would be disclosed. This is apart from the rule under section 198 of the Law of Property Act, 1925, by which the third party will be deemed to have actual notice of matters which have been properly registered. On the other hand, if the sub-contract is registered only against the sub-vendor any transferee from the original vendor would not have notice and it is thought would not be bound. So, also, for example, if the sub-vendor entered into another contract it is doubtful whether it is strictly necessary to search against him, since he is not an estate owner within the Land Charges Act, 1925, though no doubt such a search would be made in view of protection against such matters as bankruptcy and *lis pendens*.

There is, of course, the practical difficulty that at the date of the sub-contract there is no necessary knowledge of the name of the estate owner. This difficulty is not real, because there is no reason why the name should not be disclosed. In the circumstances mentioned in the letter the name is generally known at the outset. Views of other practitioners familiar with this problem would be welcome.

REMOTENESS AND ULTIMATE TRUSTS FOR STATUTORY NEXT-OF-KIN.

By P. H. Sée, of the Middle Temple, Barrister-at-Law.

In the drafting of settlements of property to be enjoyed in succession, an ultimate trust for next-of-kin, whether of the settlor, the testator, or a life tenant, has long been a commonplace. Originating no doubt in the usual trusts of the wife's fund in a marriage settlement, the trust has been adopted in a number of other cases by benefactors who, having already provided for nearer claims, are left with an ill-defined wish to "keep the property in the family". Until January 1, 1926, such trusts in themselves raised no difficulty as far as the law relating to perpetuities was concerned. Consider, for instance, a residuary bequest, in the will of a testator who died before 1926, in trust for A for life, with remainder to the child or children of A who attained the age of twenty-one or married, with remainder in default of such children to the persons who would have been the testator's statutory next-of-kin if he had died at the date of the failure of the prior trusts. The rule against remoteness is too well known to need enunciating, that limitations are invalid which may by any possibility postpone the indefeasible vesting of property for longer than twenty-one years after the falling of a life or lives in being at the date of coming into operation of the instrument in which those limitations are contained. In the example just given, A is a life in being at the date of coming into operation of the will. His children must either attain the age of twenty-one or marry, or else fail to do so, within twenty-one years after A's death, allowing (as the rule does allow) further time for the period of gestation of a posthumous child. At the moment when it can be said with certainty that the prior trusts have failed, the persons who would have been entitled on the testator's intestacy, if he had died at that moment, are determined once and for all, as are the shares in which they take. It follows that if the trust for next-of-kin takes effect at all, the property cannot fail to vest indefeasibly in the persons defined by the Statutes of Distribution within the period allowed by the rule.

The new law of intestacy has altered this position, by providing (Administration of Estates Act, 1925, s. 47) that an interest on

intestacy only vests absolutely on the person entitled attaining the age of twenty-one or marrying. If some excuse be necessary for commenting at this late date on one of the effects of this provision, the writer finds it in the fact that such comment does not yet appear to have been made.

As far as the usual marriage settlement trusts are concerned, the new law causes no difficulty. The trust in default of issue who attain a vested interest is for the next-of-kin of the wife, who is a life in being at the date of the settlement, so that the remoteness rule will still allow another twenty-one years, within which period her statutory next-of-kin must necessarily be determined. Far more dangerous is the ultimate trust, very common in wills, but adaptable to settlements, of the type given in *Key & Elphinstone's Precedents in Conveyancing* (13th ed.), vol. ii, pp. 815-816, Forms 6 and 8. Shortly, this is a trust for a child or children of the testator *or of some other person* on attaining twenty-one or marrying, and in default for the persons who would have been entitled to the property if the testator had died possessed thereof and intestate at the date of the failure of the prior trust. The motive (and it is a very natural one) for giving the property to the testator's next-of-kin at the date of failure of the prior trusts, instead of at the date of his death, is to ensure that the gift will benefit living persons rather than the estates of persons already dead.

Under the old law of intestacy, as has already been pointed out, there was no danger of such a trust being void for remoteness. Whether the prior beneficiary was a child of the testator or of any other named person, he must necessarily have attained twenty-one within the perpetuity period, if at all. On his failing to do so, the next-of-kin of the testator were immediately determinable, so that their shares must vest within the period. Not so under the new law. It is true that a child of the testator must be a life in being at the date of the testator's death, so that there is no possibility of the ultimate trust being void. But the case of a bachelor testator providing for the families of his brothers and sisters is different. Their children need not be born till after the testator's death, so that they may only fail to attain the age of twenty-one at the very end of the perpetuity period. Some one or more of the persons who would be entitled on the testator's intestacy if he had died at that date may be infants, so that it may be necessary to wait for a further period of anything up to twenty-one years before the property vests indefeasibly. It follows that the whole gift to statutory next-of-kin must be void for remoteness. The same reasoning applies, *mutatis mutandis*, to a

gift to a child of the testator for life, with remainder to grandchildren who attain twenty-one or marry, with a similar ultimate trust for the statutory next-of-kin of the testator, to be determined on failure of the prior trusts.

Even if it can be assumed that no conveyancer will have fallen into the trap since January 1, 1926, it must be remembered that the new law is applicable to wills which, though executed before that date, come into operation afterwards (Administration of Estates Act, 1925, s. 50), and the need for revision is likely to have been overlooked.

It is submitted, therefore, that a bare gift to statutory next-of-kin, if the class is to be determined at any date later than the falling of a life or lives in being at the date of the gift, must be void, and that the gift should in such a case be " in trust for the person or persons who would at the time of the failure or determination of all the prior trusts hereinbefore declared have been entitled to my personal estate under Part IV of the Administration of Estates Act, 1925, if I had died possessed thereof intestate at the time of such failure or determination, and if for the words 'who attain the age of twenty-one years or marry under that age' in section 47 of the said Act had been substituted the words 'who shall attain the age of twenty-one years or marry under that age or shall be living at the expiration of twenty-one years from the death of the last survivor of the following persons, namely [persons in being at the coming into operation of the instrument]' ".

CONVEYANCING WITH REGISTERED LAND.

(*Continued.*)

By F. R. Crane, LL.B., Solicitor.

II.—First Registration.

Under this head it is proposed first to consider the rules of law making registration of title compulsory in certain cases and the results of failure to register, and to enumerate some of the advantages and disadvantages of voluntary registration; thereafter to discuss in some detail the law and procedure relating to applications for first registration; and finally to note the effect of first registration. It is hoped that by this means practitioners will be enabled not only to determine the necessity or desirability of registration in any particular case, but also to carry the transaction through.

Compulsory Registration.

First registration may be compulsory either because the land is in an area where in certain circumstances the law requires registration, or if the land be leasehold, because the lessor's title is registered, and the subject will be considered under these two heads.

Compulsory Areas.

At present these are:—

(a) The Administrative County of London. Here registration has been compulsory in the parishes comprised in the County from various dates between January 1, 1899, and January 1, 1902. No. 4 (there are seven in all) of the Practice Leaflets for Solicitors issued by the Land Registry contains a list of these parishes (and of their former names, if any) with the dates when registration therein became compulsory, and a list of adjoining or neighbouring parishes which are, however, outside the County boundary. Whether any specific parcels form part of a parish can, as the leaflet mentions, be conveniently ascertained from the local authority when making the usual searches. Occasionally it may be found that land has since 1898 been transferred from one parish to another on an adjustment of boundaries, and in such an event the requirement of registration begins or ceases to apply, as the

case may be (section 120 (4) and (5) L. R. Act, 1925). Thus a title at first sight bad for lack of registration might be good if the land had only recently become part of a compulsory area.

(b) The County Borough of Eastbourne as from January 1, 1926.

(c) The County Borough of Hastings as from January 1, 1929.

(d) The Administrative County of Middlesex as from January 1, 1937.

Registration of title has always obviated the necessity of registration of subsequent dealings in a local Deeds Registry (section 135), so the Middlesex Deeds Registry will be partially closed (section 2, L. R. Act, 1936). A note on the present position is included at the end of this article.

A few words may conveniently be said here as to the extension of the compulsory areas, which may be done by Order in Council (sections 120—123). Such an Order may be made at the instance of a County Council, in which case it will be effectual unless both Houses of Parliament pass an Address disapproving of it; at the time of writing no County Council has requested an extension. Alternatively at least six months' notice of intention to make such an Order may be given, when both the County Council and the local Law Society have the right to call for an inquiry, which is to be conducted by a member of the legal profession. After the inquiry the Lord Chancellor is to decide whether or not to proceed with the Order; if he proceeds, the Order must be approved by both Houses of Parliament.

The Title requiring Registration in Compulsory Areas.—Section 123 (1) of the Act provides that in any compulsory area—

(a) every conveyance on sale of freehold land;

(b) every grant of a term of years absolute not being less than forty years from the date of the delivery of the grant; and

(c) every assignment on sale of leasehold land held for a term of years absolute not being less than forty years from the date of delivery of the assignment,

shall on the expiration of two months from the date thereof become void as to the legal estate unless application for first registration has been made in the meantime. When an area becomes compulsory, therefore, registration is not necessary immediately, but is required as soon as the fee simple is sold or a lease granted or assigned as above mentioned. As a result the burden and expense of first registration is normally borne by the first purchaser or lessee after the area is declared compulsory. A few points may be noted. The length of the term, in case (b) above, is to be calculated from

the date of the delivery of the grant, and not from the date mentioned in the lease as the commencement of the term; this latter date will, of course, frequently differ from the actual date of the lease (cf. *Cadogan* v. *Guinness*, [1936] Ch. 515, deciding that for the purposes of section 84 (12) L. P. Act, 1925, the length of a term must be reckoned from the date of the grant). A difficulty may arise as to future leases. " Term of years absolute " is defined by section 3 (xxvii) of the Act in the same way as in section 205 (1) (xxvii) of the Law of Property Act, 1925, and therefore includes a term to commence *in futuro*, provided it takes effect in possession within twenty-one years. There seems to be no authority as to whether a term granted for, say, thirty-five years to commence ten years hence requires registration under section 123 (1). The problem will be rare in any event, and there are two provisions under the Act which may give a solution; first, leases over twenty-one years can be voluntarily registered and, as is submitted below, must be if the lessor's title is registered, so that it would be wise to register any lease of over twenty-one years in a compulsory area. Secondly, Rule 47 provides that for the purposes of section 8 of the Act (setting out the persons entitled to apply for registration) a term in possession and a term in reversion expectant thereon within a period of one month, both vested in the same person in the same right, are to be deemed a continuous term. Whether this rule would be held to apply to section 123 is undecided, but the moral would seem to be that where terms in possession and reversion as above mentioned total more than forty years in a compulsory area, registration should always take place. It should also be noted that the words " conveyance " and " assignment " in section 123 include a deed of exchange if money is paid for equality of exchange, but do not include an assignment or surrender of a lease to the immediate reversioner where there is a declaration that the term is to merge (section 123 (3)). Merger will need to be evidenced by a declaration, since after 1925 it depends upon the intention of the parties (see section 185 L. P. Act, 1925).

Effect of Failure to Register in Compulsory Areas.—As stated above, the legal estate will be lost in a case where registration is necessary unless the grantee (defined as the person entitled to be registered as proprietor) or his successor in title applies for registration within two months (section 123 (1)). This period may, however, be extended, whether the two months have elapsed or not, by the Registrar, or by the Court on appeal, upon sufficient cause —including accident and undue expense—being shown (section 123 (1), proviso). It is thought that unless third parties will be prejudiced thereby the Registrar will normally grant an extension

of time even where the default is due only to mistake or forgetfulness, but expense will be involved.

The consequences of failure to obtain the legal estate are, of course, serious and cannot be elaborated here. (For a discussion, see Brickdale on the Land Registration Act.) Any claim based on possession of a legal estate would fail (see *Schalit* v. *Nadler*, [1933] 2 K. B. 79—right to distrain probably incident to a legal estate only; and *British Maritime Trusts* v. *Upsons*, [1931] W. N. 7—position of sub-lessee).

Compulsory Registration of Leases.

What must be Registered.—What is said under this head applies whether or not the land is in a compulsory area. A writer in Vol. 1 of *The Conveyancer* (*ante*, pp. 344 *et seq.*) drew attention to what he submitted was a popular fallacy, *viz.*, that leases of registered land fall into three classes: leases of twenty-one years or less, which cannot be registered; leases of more than twenty-one years, which may be registered, wherever the land be situate; leases of forty years or more, which must be registered if in a compulsory area. Detailed reasons for regarding this view as mistaken were given, supported by quotations from articles in Vols. 72 and 80 of the Solicitors' Journal; these reasons may be summarised (it is hoped accurately) as follows:—

A registered proprietor of freehold or leasehold land may grant leases or underleases (sections 18 (1) (e) and 21 (1) (d)); a transfer or disposition includes a lease and a transferee includes a lessee (sections 18 (5) and 21 (5)). A transfer of the registered proprietor's estate (whether freehold or leasehold) is to be completed "by the Registrar entering on the register the transferee as the proprietor of the estate transferred but until such entry is made the transferor shall be deemed to remain the proprietor of the registered estate" (sections 19 (1) and 22 (1)). Further, all other interests except mortgages (see MORTGAGES) transferred or *created* (the italics are the present writer's) by disposition by the proprietor are to be completed "by registration in the same manner and with the same effect as provided by this Act with respect to transfers of registered estates" (sections 19 (2) and 22 (2)). In other words, a lessee does not get an estate until his lease is completed by registration of his title. Section 8 (1) (a) and provisoes to sections 19 (2) and 22 (2) enact that no lease of twenty-one years or less is to be registered, but such a lease will take effect as an overriding interest (section 70 (1) (k)). Section 48 of the Act requires a notice of

any lease not taking effect as an overriding interest to be entered on the lessor's title (if this be registered). Finally, section 123 will apply to leases of forty years or more.

The present writer respectfully submits that the above reasoning is sound, but even if a contrary view be taken the safest course in practice will be to register where there is any doubt. The position in regard to leases may therefore be stated as follows:—

(a) A lease for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine, is an overriding interest (section 70 (1) (k)), and the title thereto cannot be registered (section 8 (1) (a) and provisoes to sections 19 (2) and 22 (2)). From this wording it would seem that a term of twenty-one years to take effect at a future date would be an overriding interest, but there is no authority.

(b) If the lessor's title is registered, the title to any term of more than twenty-one years must be registered and in addition be protected by a notice under section 48. Rule 47 mentioned above must be noted in regard to the length of a lease and a reversionary lease.

(c) In a compulsory area, whether or not the lessor's title is registered, the title to any term of more than forty years, as above defined, must be registered; if the lessor's title is registered, section 48 will also apply.

It should be noted that whether or not the lessor's title is registered can be ascertained, apart from inquiry of the lessor, by a search of the Index Map; the method of searching this Map and the information obtained is dealt with below under the head of procedure.

Effect of Non-Registration of Leases or Non-Entry of a Notice under Section 48.—What is said under this head does not, of course, apply to leases taking effect as overriding interests, but only to leases requiring registration and protection under section 48 as outlined above. The difficulties are many and complex and it is only possible here to indicate some of them.

To deal first with the position where a registered proprietor grants a lease. Unless he registers the lessee will presumably not get a legal estate (sections 19 (2) and 22 (2)) and therefore it seems that his rights will depend on section 48. Entry of a notice under this section makes any subsequent disposition by the registered proprietor subject to the interest (so far as the same is valid) protected by the notice (section 52 (1)). How far this would protect a lessee who has failed to register his own title is uncertain, but *prima facie* there seems to be no reason why he should not be

held to have a minor interest equivalent to an agreement for a lease, which latter is properly protected by a notice under section 48. Furthermore, the rights of persons in possession or in receipt of rents and profits are overriding interests (section 70 (1) (g)), but the relation between this provision and section 48 is undecided (see Potter, Conveyancing under L. R. Act, at p. 248). It may also be mentioned here that a lease containing an absolute prohibition against assignment cannot be registered (section 8 (2)), yet if for more than twenty-one years it is not an overriding interest, and so can only be protected under section 48. There is no authority as to whether failure to obtain entry of a notice under section 48 by a lessee who had nevertheless registered his title would render his legal estate liable to be divested on a sale by the lessor; in practice the problem will not arise because the Registrar will automatically take up the question of a note under section 48 (see below, Registration of Original Lessee).

Secondly, the position where the lessor registers, voluntarily or compulsorily, after the grant of a lease. The lessor ought to produce the lease to the Registrar, who will enter a notice (Rules 40 and 186), and if he failed to do so it would seem that a lessee thereby damnified might obtain rectification of the register or compensation from the indemnity fund (sections 82 and 83 (2)). As to registration of the lessee's title, it is submitted, without authority, that he would not be prejudiced by non-registration in the circumstances now under consideration, since he obtained a valid legal estate at the time of the grant which did not then require protection under section 48; it is also submitted that a subsequent assignee would be no worse off. One sure method of protection is available, for a caution against first registration by the lessor could be registered, whereby the lessee would get notice of an application by the lessor (see section 53, Rule 64, and Forms 13 and 14). It is thought that in practice entry of such a caution by a lessee is unusual.

Whatever the answer to the above questions may be, it is submitted that sufficient has been said to emphasise the desirability of a search of the Index Map prior to the grant of any lease not being an overriding interest, and of registration and entry of notice under section 48 whenever the lessor's title is registered. Such procedure would also seem to be the safest course on assignment. Finally, it should be pointed out that sub-lessees will take a risk unless they make sure that all necessary formalities have been observed in regard to the lessor's own lease (see *British Maritime Trusts* v. *Upsons*, [1931] W. N. 7).

Voluntary Registration.

Most of the pros and cons of this will appear automatically as the system outlined in these articles is compared by the reader with unregistered conveyancing, but it may be useful to consider two particular advantages claimed for registration: that it gives a State-guaranteed title and that the investigation of title is reduced to a minimum.

The first claim must be qualified by adding "subject to overriding interests", since these, as the *Chowood* cases show (see *Effect of First Registration*, below) may substantially destroy the value of the so-called guarantee. Subject to this, however, it is true to say that registration gives a fully marketable title. Further, it may be used to cure technical defects. Practice Leaflet No. 5, on First Registration, says: "The title should be such as a willing purchaser, acting under competent professional advice, could properly be advised to accept . . . full information should be given on any points regarding which a well advised purchaser would raise requisitions." In practice this seems to mean that absolute or good leasehold title will usually be granted where there is a technical defect (especially if it be over twelve years old) which in unregistered conveyancing could be dealt with by a condition in the contract. Such a defect was recently illustrated in *Re Spollon and Long's Contract*, [1936] Ch. 713, where the Court refused to force a purchaser under an open contract to accept a statutory declaration (contradicting the usual presumption) that an alteration in the consideration stated in a deed (stamped for £22) from £22 to £75 had been made after delivery. The writer had in practice a case where the effectiveness of a joint account clause in a mortgage, under which a surviving mortgagee had given a receipt about fourteen years before, was questioned; an application for registration with absolute title was successful. In cases such as these, it is thought that practitioners would have difficulty in advising a client not to accept a title subject to a condition in the contract; yet, on a future transaction, apart from the necessity of inserting a condition, there might be difficulty if the advisers of the then purchaser took a different view. It is suggested that in such cases registration prior to completion (at the expense of the purchaser if the vendor refuses to bear it) might be made a condition of the contract. It may also be mentioned that whereas in unregistered conveyancing there is usually no protection against forged title deeds, section 83 (4) of the Act gives some rights of compensation to an innocent proprietor damnified by a third party's fraud; this also applies to chargees (see *Re Leighton's Conveyance*,

[1937] 1 Ch. 149). Incidentally, it has been found that lay clients are often of the opinion that under the system of registration qualifications to the title or disputes as to boundaries are impossible.

As to the reduction of investigation of title, it is submitted that this has been successful as regards sales. Registration reduces very considerably the time and work, and normally the expense, of the preparation, perusal and examination of the abstract, although, of course, difficulties remain; *e.g.*, as to overriding interests (see previous article, Vol. 2, No. 1, at pp. 49, 50). Furthermore, personal inspection of the Register (see TRANSFER ON SALE below) will take time, as the Registry does not always have the documents at hand. Once the cost of first registration has been met, the solicitor's costs on subsequent sales are considerably reduced, although Land Registry fees are payable. It is submitted that the registered scale fee is not always adequate, but the reduction of work may sometimes be compensation for the reduction of costs, although if the transfer is complicated there may be little saving of work as compared with an unregistered case where the title is simple but the drawing of the conveyance complicated. On transactions other than sales, *e.g.*, leases or settlements, the work is not reduced but rather increased by the necessity of registration, while no costs are saved and in addition Land Registry fees are payable. Where a subsequent sale or sales are contemplated—particularly on a building estate (see BUILDING ESTATES below)—voluntary registration is probably advantageous, but in other cases there does not seem to be any gain. The Chief Land Registrar's Report for 1936 indicates that a large proportion of the voluntary registrations for that and previous years were of building estates.

Other disadvantages of voluntary registration may occur from time to time as the Act comes to be judicially interpreted and is worked in practice—as witness the problem of leases discussed above. Attention should here be drawn to an article in Vol. 1, *ante*, at p. 185, in which the author thereof makes a forceful reply to claims which were made by the Registry in a pamphlet issued in August, 1937; the points made in the article, some of which are mentioned above, deserve consideration where voluntary registration is being contemplated.

PROCEDURE ON FIRST REGISTRATION.

The Index Map.

Mention has already been made of the desirability of searching the Index Map as a preliminary to first registration and in other cases. The Registry keeps Index Maps (including the General

Map) showing the position, extent and original (and, where possible, current) title number of every registered estate; if the General Map is used there is a separate Parcels Index showing the current numbers (Rule 8). These maps, with the list of pending applications for registration, are open to public inspection, so that it is always possible to ascertain whether the title to any particular land is registered. The search may be personal or official; if the latter, the application must be in writing and describe the land, in a non-compulsory area, by means of a copy or extract from the largest scale Ordnance Map (Rule 286). Where the land is in a compulsory area, however (including Middlesex), the Registrar has recently announced that he is able to dispense with a plan if the land be clearly described, *e.g.*, by road number, and that such official searches shall be free. There is no prescribed form for an application for search, but a precedent is given in Potter's Conveyancing under L. R. Act, at p. 414. The official certificate of search (including a marked copy of the plan if a duplicate be sent) will state whether the land is registered, and if so for what interest, and will also give particulars of any priority notice or caution against first registration. A search of the Index Map does not give protection for any period, so should be made at the last possible moment prior to the grant of the lease, etc., occasioning it.

The fees payable are: on a personal or official search in a compulsory area—no fee; on a personal search in a non-compulsory area if a contract for the purchase of the land affected is produced —no fee; on a personal search in other cases in a non-compulsory area—2s. 6d.; for an official certificate of search in non-compulsory areas—5s.

Application for First Registration.

Who may Apply.—In the case of freeholds, any estate owner in fee simple (including a tenant for life, statutory owner, personal representative or trustee for sale), whether or not subject to encumbrances, may apply for first registration (section 4 (a)), as may any other person entitled to require a legal estate to be vested in him, except a mortgagee where a right to redemption exists or a person who has only contracted to buy (section 4 (b)). In the case of leaseholds, any such estate owner holding under a lease for a term of years absolute of which more than twenty-one are unexpired (section 8 (1) (a)), or any such other person entitled to require such a legal leasehold estate to be vested in him, may apply (section 8 (1) (b)). A beneficial owner may in either case have a nominee registered (sections 4 and 8 (1)). As has been

previously mentioned, a lease containing an absolute prohibition against assignment may not be registered (section 8 (2)). Where a mortgagee, after the right of redemption has gone, applies to be registered, and is entitled in equity to any outstanding days, he is to be registered as proprietor of the mortgagor's term, unless the whole of the land subject to that term was not mortgaged (section 8 (3)).

It will be noted that where less than twenty-one years of a lease are to run, no application can be made, and presumably such terms were intended to take effect as overriding interests, but section 70 (1) (k) refers only to the *grant* of terms for less than twenty-one years. (See also, however, section 70 (1) (g) as to rights of persons in possession.)

Reference may also be made to *Dennis* v. *Malcolm*, [1934] Ch. 244, in which it was held that the Registrar rightly refused to grant an absolute title where under the Schools Sites Act, 1841, there was a right of reverter on the land ceasing to be used for a school, and it had so ceased. This may be of importance in regard to charities.

Information to be Given on Application.—The best summary of this seems to be Rule 20, which says:—

"The application shall, unless the Registrar otherwise direct, be accompanied by—(i) all such original deeds and documents relating to the title as the applicant has in his possession or under his control, including opinions of counsel, abstracts of title, contracts for or conditions of sale, requisitions, replies, and other like documents in regard to the title; (ii) a copy or sufficient abstract of the latest document of title not being a document of record; (iii) sufficient particulars by plan or otherwise to enable the land to be fully identified on the Ordnance Map or Land Registry General Map; (iv) a list in triplicate of all documents delivered."

If the land is leasehold the original lease and thereof a copy must be lodged (Rule 21). As regards Rule 20 (iii), a plan will generally be necessary, except in occasional cases in compulsory areas, or where the plan on the conveyance to the applicant is sufficient. It was emphasised in the previous article that as the Ordnance Map is the basis of descriptions of registered land, too much care cannot be given to the preparation of plans (see Rules 272—285). As to boundaries, see the discussion below of the form of application.

The Registrar can ask for such further evidence of title as he thinks necessary (section 14 (2)) and in particular may require both the applicant and his solicitor to make statutory declarations (which may have to include a statement of their means of knowledge)

that all deeds, etc., encumbrances and material facts have been disclosed (section 14). If the registration is not taking place immediately after a purchase the Registrar will probably require such declarations to include a statement that the applicant has been in undisturbed possession since his purchase.

There seems to be no objection to inserting the words "so far as I am aware" where the declarant has only presumptive knowledge, *e.g.*, where the applicant swears that all documents of title have been disclosed. Frequently such declarations need not be stamped in the first instance.

Mention may be made here of Rules 50—55, providing for the registration of manors, advowsons, rents and other incorporeal hereditaments, mines and minerals severed from the land, flats and tunnels. Application is to be in the form prescribed for ordinary land subject to necessary modification to the Registrar's approval; in particular satisfactory plans or references to the General Map, supported if required by verbal description, must be lodged. In the case of mines and minerals and cellars or flats notice must be given to the reputed owners and occupiers of the adjoining tenements, and in the case of rents to the reputed owners and occupiers of the lands out of which they issue. The word "reputed" presumably means that the title of such owners need not be strictly proved (compare the case of fixed boundaries, discussed below).

Practitioners concerned with small holdings under the Small Holdings and Allotments Acts, 1908 to 1919, may be referred to Rule 63, which greatly reduces the information that has to be supplied on behalf of the County Council.

Form of Application.

The Registry has issued a number of forms, one of which has to be completed by the solicitors to the applicant; these forms, which vary according to circumstances, are based on those given in the Schedule to the Rules (see Rule 19) and on Practice Leaflet No. 5. The appropriate form must be selected or the application will probably be returned for amendment. It is proposed to deal in detail with an application by solicitors for registration of an applicant on the purchase of freehold land, and subsequently to note any differences occurring in other cases. It should be mentioned that, in addition to differing according to the circumstances of the application, the forms issued present variations for which there seems to be no particular reason; for example, the requirement of disclosure of matters registered under the Land

Charges Act, 1925, may appear as a statement by solicitors in the body of the form, or as a marginal note. Furthermore, matters may be added when fresh forms are printed, but the general content remains constant. Where a building estate is to be registered there are special considerations which will be dealt with separately (see BUILDING ESTATES) although the same forms are used. Finally, it should be noted that, although personal applications are possible, the forms considered below are those used where solicitors apply on behalf of a client.

Registration of a Purchaser of Freehold Land.—Form 1B for an individual and 1E for a company. The matters to be considered are dealt with in the order in which the practitioner completing the form will encounter them.

After spaces (ignored for the moment) for the Registry date stamp and fee stamps, there have to be inserted short particulars of the property (*e.g.*, 1 The Avenue, Middleton, or, Land at Middleton), its value and the amount of the fee (see below). If application is made within a year of a sale, the value is to be the purchase price; in other cases it will be such amount, not exceeding twenty times the annual value, as the Registrar thinks the property, including any buildings, etc., erected, would fetch in the open market (L. R. Fee Order, 1930, r. 9). The Registrar can accept a statement by the applicant or solicitor and will probably not question a reasonable estimate.

The application proper then follows, whereby the solicitors apply for registration of the applicant (whose name and address must be in block letters) " as proprietor with absolute title of the freehold land in the Parish of X in the County of Y described in the accompanying conveyance dated (etc.) and made between (etc.) ". Such words as " and delineated on the plan sent herewith " can properly be added if, as will often be necessary, a separate plan is lodged (Rule 20 (iii); and see Form No. 1, L. R. Rules, Schedule).

Thereafter certain statements have to be made by the solicitors, and these are dealt with below. Obviously the paragraphs may require deletion or modification to suit the facts, and in particular the words " so far as we are aware " can be added where this seems desirable.

1. Boundaries:—that all boundaries are clearly defined by natural physical features or substantial boundary posts and that the applicant is in exclusive possession of the land. If posts are used they must be 4 to 5 feet high (pegs are not enough) and should be erected at least every 50 yards and on any change of the direction of the boundary (L. R. Directions for Estate Surveyors). As was

pointed out in the previous article (p. 47 above) the boundaries will normally only be general (Rule 278), and applications for fixed boundaries will be so rare that the procedure in any case will probably need to be worked out step by step with the Registry. Rule 276 provides that notice of any application to fix boundaries shall be given to adjoining owners, which would necessitate the latter's title being proved by strict conveyancing evidence. Even if the adjoining owners were helpful, so that the applicant could lodge abstracts of their titles, there would be very considerable expense, and in any other case the cost would be prohibitive. It would seem, therefore, that an application for fixed boundaries is only practicable where part of an estate is sold, so that the boundary to be fixed runs between parcels both held under the one title; in such a case a reference to annexed particulars might be added to the paragraph under discussion. As to the statement of exclusive possession, it is suggested that "subject to a lease dated, etc." be added if the property is let, although the point is dealt with specifically in a later paragraph where disclosure of leases is required.

2. Effect of Conveyance:—that the solicitors acted for the applicant on his purchase, investigated title in the usual way (including searches) and believe as a result that the conveyance validly transferred the estate therein mentioned free from any adverse rights not shown thereby, and that the whole of the purchase money was paid to the persons mentioned in that behalf in the conveyance. Mention should be made of any adverse rights not shown by the conveyance, of course, but otherwise no amendment will usually be necessary. It is conceived that the statement as to purchase money can properly be made where a mortgage is paid off on completion and part of the money is in actual fact handed to the mortgagee's solicitor.

3. Nature of Ownership:—that the applicant applies as beneficial owner, or that they are jointly and beneficially entitled so that the survivor will be able to give a receipt, or that he or they are entitled under section 4 (discussed above) as tenant for life, etc. It will be observed that a distinction is drawn between joint tenants beneficially entitled and trustees for sale, and in the former case the Registrar brings the equities on the title. A purchaser will not be concerned to see that money is paid to two persons unless a restriction on disposition appears on the Register. If the joint tenancy is subsequently severed application for entry of the appropriate restriction should be made (section 58; and see Settled Land, *infra*).

4. Encumbrances and Adverse Interests:—that the solicitors

are not aware of any contract, lease, charge (including in the case of a company debentures or floating charges), or other encumbrances except as stated in the said conveyance or in the Schedule to the form, that there is no one in adverse possession and (at present in Form 1B only), if less than thirty years' title was accepted, that the deeds contained no restrictive covenants that would have been discovered on a full investigation and that specific inquiry of the vendor showed that he knew of none. This last statement, if insisted upon, will be of very considerable importance, since it will mean that a preliminary inquiry or requisition as to restrictive covenants imposed prior to the root of title (if less than thirty years old) must always be raised, and a condition precluding such inquiry should not be accepted.

5. Defects in Title:—that the solicitors are not aware of any such. If there is a technical defect or doubt, a reference to it should be added so that the Registrar may consider its importance, if any.

6. Deeds, etc.:—that there are sent all deeds and documents (see Rule 20 (1)), including if the applicant is a company copies of the memorandum and articles of association and of the certificate of incorporation, and that these are set out on the list in triplicate. The forms for this list (No. A 13) are provided free.

7. Marking of Abstracts:—that all copies and abstracts have been examined and marked and that none of the land charges (if any) disclosed on the official certificates of search affect the land; and, if a company is applying, that any existing charge does not contravene the memorandum and articles, that a certificate of its registration under section 82 of the Companies Act, 1929, is sent, and that there has been no petition or resolution for winding up. Care should be taken in the marking of abstracts because an omission will involve the return of the document for completion.

8. Merger of Leases:—that no note of the lease sent be entered. This will, as a marginal note indicates, only be relevant where merger of the lease is applied for.

9. Signature:—this completes the body of the form, which is now signed and dated by the solicitors, but if registration in the name of a nominee is desired the applicant must sign personally and consent by the nominee be lodged.

10. Schedule of Encumbrances:—this will only require completion where the encumbrances are not shown by the conveyance (see paras. 2 and 4 above).

11. Instructions regarding Documents:—first, a list of "documents herewith", specifying the most important and thereafter referring to the list in triplicate, and subsequently spaces for

insertion of the name and address of the solicitors to whom deeds are to be returned, the Land Certificate issued, etc. It may again be emphasised that a certified copy of the last document of title must be sent.

This completes the form which, with the various documents and list in triplicate, is now ready to be lodged.

Registration of Freehold Land—not on a Purchase.—Form 1C (there is no separate form for companies) which follows closely Form 1B just discussed, but the following variations may be noticed:—

(a) The formal application refers to land "described in the accompanying deed dated etc." (being the conveyance to the applicant), but if part of such land has been sold reference to an accompanying plan will be necessary.

(b) Effect of Conveyance (para. 2 above).—This is replaced by a statement that the applicant has been in undisputed possession or in receipt of the rents and profits for upwards of x years. It seems an obvious case for the insertion of "so far as we are aware".

(c) Encumbrances and Adverse Interests (para. 4 above).—The certificate as to restrictive covenants imposed prior to a root of title less than thirty years old does not appear, but it may be that the Registrar would ask for it subsequently.

(d) Deeds and Documents and Marking of Abstracts (paras. 6 and 7 above).—These appear partly as statements and partly as marginal notes. The only important difference appears to be that the certificate as to a charge by an applicant company not contravening the memorandum and articles is here required (by marginal note) in the form of a statement by the secretary instead of by the solicitors. Although this is inconsistent the best course in practice will usually be to follow exactly whichever form is being used.

(e) Value of Land (new).—That the solicitors are well acquainted with the land and that to the best of their knowledge, information and belief the value does not exceed £x. The remarks made above in regard to value apply to the estimation of this figure, which will be the same as that to be inserted at the head of the form.

Registration of a Purchaser of Leasehold Land.—Form 2B for an individual and 2E for a company. These follow, and show

between themselves, the same variations as Forms 1B and 1E discussed above, so that the remarks there made are fully applicable; however, two points of difference require notice:—

(a) The formal application is made out for good leasehold title to the leasehold land "demised by a lease dated etc. and comprised in the accompanying assignment to the applicant dated etc." Should title absolute be desired (this has been rare in the past but, as a result of *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610, mentioned in the previous article, may become more frequent in the future) it is suggested that all that need be done at the present stage, in addition to altering "good leasehold" to "absolute", is to lodge with the documents a properly marked abstract of the lessor's title. The Registrar can then call for such further evidence as he may require; if the lessor's title is registered nothing more may be wanted, but in other case he will probably want to see the deeds.

(b) The reference to acceptance of less than thirty years' title does not appear; often, of course, the applicant will have all assignments even if some are over thirty years old.

Registration of Leasehold Land not on a Purchase.—Form 2C; the only one. This follows exactly Form 1C relating to freeholds, except that the nature of the title applied for is good leasehold and the description of the land is as in Forms 2B and 2E above, so that amendment will be necessary if title absolute is wanted.

Registration of Original Lessee.—Form 3B for an individual and 3E for a company. In the preliminary part of these there has to be inserted, instead of the value of the land, particulars of the annual rent and premium (if any) and also the lessor's title number, if his estate is registered.

The formal application, except for the omission of any reference to an assignment, is identical with that in Forms 2B and 2E, relating to purchasers of leaseholds, and the same remarks are applicable. Thereafter the solicitors have to state:—that the boundaries are duly defined; that the applicant is the lessee named in the lease; that he applies as beneficial owner, etc.; that there is no agreement, charge, etc., not referred to in the Schedule nor any person in adverse possession; that the lessor's title is registered under the above title number and that his Land Certificate is or has been previously lodged in the Registry, or that his title is not registered.

The usual signature, Schedule of incumbrances and instructions as to documents follow.

The considerations arising from the above clauses have been discussed in relation to the other forms and no further comment

seems necessary, except as to the particulars relating to the lessor's title, which are presumably required in connection with entry of a notice of the lease under section 48, previously discussed, or, if the lease is for twenty-one years or less and therefore an overriding interest, of a note at the Registrar's discretion under section 70 (3). In an appropriate case it would seem desirable to add to the form a sentence requesting entry of a notice or note, although this will normally be automatic. A search of the Index Map will show whether the lessor's title is registered and, if so, the number; if it is registered, the lessee's solicitor should ask the lessor's solicitor to deposit his client's Land Certificate in the Registry prior to completion (Form A 14), and to give particulars of the deposit number. It would be extremely rare in practice for the lessor or his solicitor to object to doing this (although the lessee would, it seems, have to pay the costs) and almost certainly no question will arise. It is conceived, however, that the lessor cannot properly refuse to lodge his Land Certificate. Section 64 (1) requires deposit of the Certificate before entry of a notice, as a rule; entry of a notice of a lease at a rent without a fine is excepted but it is unusual for such leases to be for more than twenty-one years. Section 48 makes the consent of a lessor bound by a lease unnecessary, and Rule 46 contemplates that he shall be given notice of the application and entry made unless he objects. Since the lessor's consent is unnecessary, it would seem to follow that he is bound to lodge his Certificate. The procedure for enforcing production and lodgment, if this were ever necessary, seems uncertain; the Registrar might make an order (see section 64 (2)) or an order of Court might be required (see section 48 (2)). It seems that sometimes in practice the Registrar enters a notice under the procedure of Rule 46, without calling for the lodgment of the lessor's Land Certificate.

Lodgment of Application and Payment of Fees.

The completed application must be lodged personally or by post at the Land Registry, Lincoln's Inn Fields, W.C.2. In the former case it should be taken to Room 101, where the fee is paid and the stamp impressed on the form of application; this, with the documents and list in triplicate, is then placed in one of the envelopes (free) to be found in the main hall and posted in one of the boxes there. If the application is by post, a banker's draft or cheque may be sent for the fees (L. R. Fee Order, 1930, No. 2). One copy of the list in triplicate, with the application number (which must be quoted in all communications) stamped thereon, will be returned to the solicitors.

The fees are prescribed by the Fee Order of 1930, where full

tables may be found (see also The Solicitors' Diary and any of the larger books on land registration). The rates of fees are as follows and are divided into three Scales. Scale No. 1, applying to all registrations not by original lessees is: 1s. per £25 up to £750 with a minimum of 10s., 3s. per £50 from £750 to £1,500, 2s. 6d. per £50 from £1,500 to £2,000, 2s. per £50 from £2,000 to £3,000, and 1s. per £50 from £3,000 to £10,000, and 1s. per £100 from £10,000 to £100,000; higher amounts are charged as £100,000. In this and all the Scales parts of £25, etc., are charged as the full figure and the rates are consecutive, *i.e.*, on a price of £1,250 the first £750 is charged at 1s. per £25—30s., and the remaining £500 at 3s. per £50—30s., a total fee of £3. Scale No. 2, applying to registration by original lessees on grants of leases not at rack rents, or on grants of freehold land at a rent, is: 10s. for rents up to £10, 2s. per £5 from £10 to £50, 1s. per £5 from £50 to £150, and 6d. per £5 over £150, with a maximum of £59. In addition a fee under Scale No. 1 is payable on any premium but the maximum of £59 is not to be exceeded. Scale No. 3 applies to leases at rack rents and is: 3s. per £20 up to £100 with a minimum of 10s., 1s. per £20 from £100 to £500, and thereafter 1s. per £50 with a maximum of £59.

If a charge by the applicant is lodged with the application no separate fee is payable on such charge (L. R. Fee Order, 1930, Abatements, 1). In the event of an overpayment the excess is returned but if less than £1 only on an order of the Registrar (L. R. Fee Order, 1930, r. 3).

The above fees normally cover all the work done by the Registrar, but in exceptional cases—*e.g.*, if the title is very complicated or if a boundary were fixed—the Registrar has a discretion to make further charges (L. R. Fee Order, 1930, rr. 4, 5 and 8), but the applicant is to receive notice before extra liability is incurred.

The fees are considerably reduced if registration is of small holdings or land acquired for certain public purposes (section 145; L. R. Fee Order, Abatements 12 and 13).

Investigation of Title by the Registrar.

The practitioner will not usually be concerned with the detailed provisions in the Rules as to this—for example, the power to make searches or refer the title to a conveyancing counsel. It should however be noted that in a compulsory area where the value of the land is less than £700, or less than £1,000 if application is made within two years of a public auction, the Registrar can give

absolute or good leasehold title without investigation on production by the solicitor of a certificate to the effect of paragraph 2 of Form 1B above. Also, except on registrations by original lessees or, in compulsory areas, by purchasers within a year, the Registrar must give notice of the application by advertisement in the London Gazette and a local paper.

In some cases requisitions will be raised by the Registrar, if only to ask for the statutory declarations referred to in section 14 (see information to be given on application), and these must be dealt with according to the circumstances. Usually a time limit for reply will be given and default (the time can of course be extended) will probably involve return of the application and loss of the fees paid. The time which will elapse between lodgment and issue of the Land Certificate will vary with the particular facts, but it is thought that about a month will be usual.

Issue of Land Certificate and Return of Deeds.

When his investigation of title is complete and all deeds (or such as he thinks necessary for the purpose of giving notice of the registration to subsequent purchasers) have been marked with the Registry stamp, the Registrar may complete the registration (section 16). The Land Certificate will then be issued in the form already described (see previous article, Vol. 2, No. 1, at pp. 45—46) and the deeds and documents returned to the solicitors named for that purpose in the form of application. Some deeds, etc., may be retained; the Rules are obscure and the practice varies—the conveyance to the applicant used to be retained but now seems generally to be returned. The Land Certificate should be carefully examined and any mistake or omission raised with the Registrar; the Registry officials maintain an extremely high standard of accuracy but the writer once encountered a case where two noughts were omitted in stating the rent of a lease. It will be remembered that charges and minor interests should be protected on the Register (see sections 5—7 and 9—12), as should easements, rights, privileges and benefits created by an instrument (section 70 (2)), but other overriding interests are noted at the Registrar's discretion. A first proprietor not entitled for his own benefit holds subject to pre-existing minor interests of which he knows, even if they are not mentioneud on the Register (sections 5—7 and 9—12).

If the land is leasehold and the lease contains a prohibition against assignment, etc., without consent, a restriction is to be placed on the Property Register (section 8 (2)). The form

(Rule 45) is that " all estates rights interests powers and remedies under such lease arising upon or by reason of alienation without licence shall be expressly excepted from the effect of registration ". Presumably a lessee entitled to assign, etc., without licence under section 19 (2) of the Landlord and Tenant Act, 1927, where consent is unreasonably withheld, does not infringe this restriction although nothing is said in the Act or Rules. In practice the licence does not have to be produced to the Registry on registration of a dealing.

Effect of Registration.

The rights conferred by an absolute, good leasehold, possessory or qualified title were considered in the previous article (above, Vol. 2, No. 1, pp. 47—49) and attention there drawn to the important case of *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610, which decided that lessees are bound by restrictive covenants and other interests registered against a superior title. Section 69 of the Act provides that the proprietor shall be deemed to have vested in him the fee simple in possession or the legal term created by the lease, subject to overriding interests, and also deals with the vesting of satisfied terms and outstanding legal estates. Entries in the Charges Register are not mentioned here but it is of course abundantly clear that the first proprietor and his successors hold subject thereto (*e.g.*, sections 5—7, 9—12 and 52). Further, no proprietor (except a first proprietor not beneficially entitled) will be subject to interests which are not overriding nor protected on the Register (*Hodges* v. *Jones*, [1935] Ch. 657). In this case it was sought to prove after conveyance an agreement by a vendor, collateral to the contract of sale, that land should be laid out as tennis courts; the attempt failed, but the Court also held that had it succeeded there would have been no rights against the registered proprietor, who was a successor in title of the vendor, unless the Register could be rectified under section 82, for which no case had been made out.

The importance of overriding interests has been previously stressed, but reference must be made to *Chowood, Ltd.* v. *Lyall*, [1930] 1 Ch. 426, and *Re Chowood's Registered Land*, [1933] Ch. 574. In the first case Lyall successfully applied for rectification of the Register on the ground that, at the date of Chowood, Ltd.'s registration, she (Lyall) had acquired a title to part of the land by adverse possession; in the second case Chowood, Ltd., was held not to be entitled to compensation, because their title was in any case subject to the rights of adverse possessors (an overriding interest—section 70 (1) (f)), so that rectification had

not damnified them in any way. Logically this is correct, but it is hardly what the man-in-the-street would have expected.

Once the title is registered, the registered proprietor can only dispose thereof in accordance with the Act (section 69 (4)). Wide powers of disposition of freeholds and leaseholds are contained in the Act under various heads (see, *e.g.*, sections 18, 21, 25, 40, 106, 107). A full list is given in Potter, Conveyancing under L. R. Act, at pp. 30—33, where it is also pointed out that this enumeration of powers of estate owners is liable to make some unwitting change in the law or to raise doubts as to principles settled in unregistered conveyancing. So far as the present writer is aware, no necessary power of disposition, etc., has been omitted from the Act, although the decision in *White* v. *Bijou Mansions, Ltd.* (*supra*) is a somewhat unexpected result of the definition of the power of disposition, for it has taken restrictive covenants, in relation to registered land, outside the limits of the doctrine of *Tulk* v. *Moxhay*; the requirements of registration of leasehold titles, discussed above, are another example of (probably) unintended legislation. Furthermore, dispositions require completion by registration of the transferee, lessee, etc., as proprietor of the interest transferred or created, and until then the transferor remains proprietor of the legal estate (sections 19, 20, 22, 23). Dispositions not so completed normally take effect only as minor interests (section 101) and require protection as such.

Finally, it should be noted that once land is registered the Land Charges Act, 1925, ceases to apply (except as to local land charges) as do the requirements of registration in any local Deeds Registry (section 135; Rule 43), being replaced by the provisions of the Act.

It will have been observed that nothing has been said here as to Possessory or Qualified titles, nor were the special provisions as to registration with Possessory title (see Rules 36, 38) dealt with. These matters are omitted because they are uncommon and it was thought undesirable to introduce more unusual details than necessary. Reference will, however, be made thereto in dealing with building estates (see Building Estates, *infra*).

The Middlesex Deeds Registry.

Reference may be made to *The Conveyancer*, Vol. I, *ante*, pp. 94, 294 and 386, where this topic is dealt with. The position may be summarised shortly as follows :—

No deed made after January 1, 1937, can be registered in the Middlesex Deeds Registry (L. R. Act, 1936, s. 2 (2)). Deeds made

prior thereto may be registered up to December 31, 1938, as may discharges of mortgages, whenever made; after that date no deed may be registered and there is no relief from penalties (L. R. Act, 1936, s. 2 (3) and (4)). It has been suggested, however, that an unregistered deed would be given effect to on first registration, and that discharges of mortgages dated after December 31, 1938, operate under the ordinary law of unregistered conveyancing (Vol. I, *ante*, pp. 94—95). Official searches may still be made (Middlesex Deeds Rules, 1936) and these will be necessary where land in Middlesex is transferred prior to registration, as will usually happen, since registration is only compulsory on sale. Personal searches are no longer possible. Office copies of memorials may also be obtained (M. D. Rules, 1936). The Middlesex Deeds Rules, 1926, and Middlesex Deeds Fee Order, 1927, contain the forms and fees prescribed for applications for searches, etc., except the form requesting an office copy of a memorial which is scheduled to the Rules of 1936.

RECLASSIFICATION OF PROPERTY LAW.

Many years spent in the study and teaching of the law of Property have shown the writer that one of the great difficulties experienced by the student of this subject is its vocabulary. Airily to dismiss this aspect of property law with the observation that it is due to its long growth through the course of changing economic and legal ideas is only to offer the reason of the problem. It does not explain how it can be best modified. In fact it is not dependent primarily on the use of strange words, such as afflict the beginner in Roman law. Most of the words employed have an ordinary connotation in every day life. To the shopkeeper, and, consequently, most purchasers the expression " remainder " is simple enough. We all know that it is something that has been left over from the course of commerce and may be acquired cheaply. This use by the shopkeeper is a simple variant on the ordinary dictionary meaning, easily perceived and readily applied. When remainder is incorporated into the terminology of real property it is peculiar and difficult to reconcile with any dictionary meaning, as evidenced by the well-known coach's tag " reversions remain, remainders don't ".

However, if it was only that a vocabulary of terms having an unusual content had to be acquired the difficulty would be less than it is. The same circumstances, which have made words to have an unusual connotation, have also obscured the exact definition of many of the terms employed. So, for example, the word " powers " does not clearly convey its meaning in all contexts. Under the Settled Land Act, 1925, an estate owner is said to have the powers of disposition of a tenant for life, yet the purpose of the reforms inaugurated by that legislation was to transfer the method of conveyancing under settlements from powers to estates. An estate owner has vested in him the largest estate of which he can by statute make a disposition. The use of the term powers, therefore, raises by implication the question whether the estate vested in him by statute confers upon him any of the rights of disposition incident to a pure common law estate. In other words whether or not he has a purely statutory estate. To treat it as simply a statutory estate gives rise to a whole series of other problems in connection with use and enjoyment.

Another common law example of the same difficulty is the use

of the term "reversion" in connection with the freehold in possession subject to a term of years, which is properly an estate in possession, and in connection with the estate vested in a freeholder after a grant of a smaller freehold interest, which is properly an interest in expectancy. Even "expectancy" itself is not without its peculiar difficulty employed, as it sometimes is, to describe a mere "spes" which is not a true interest in property at all. Without the introduction of a new code independent of the historic property law it is not easy to see how these uncertainties and obscurities can be entirely removed from the property law. A careful analysis and precise definition of the existing position with some elaboration of the principles embodied and possibly the incorporation of some new and more definitely limited expressions might go some way towards clarifying the present law. If they could form a model to be adopted in all future legal argument they would end by some simplification and the avoidance of future misuse with consequent error. It is in this respect that the *Restatement of the Law of Property* (*a*) is a valuable production to serious students of property law in this country. The absence of cited authorities and the differences between American and English law render it an unsafe guide to many details of the law, particularly since the Property Legislation of 1925. Much can, of course, be learned from the fresh clear statement of the principles of many well-known rules, and the examples which are given are remarkable for their repository value. It is, however, in the essential reclassification by definition of property rights and interests that this work finds its chief interest for the English lawyer.

It is to be noted that the introduction opens with the definition of certain general terms. It does not define "property" as such but in an introductory note limits its use in the restatement to denote legal relations between persons with respect to a thing. Nor does it define a thing but says that it may be an object having physical existence or "any kind of an intangible such as a patent right or a chose in action". It is hoped that in a later section of the restatement on property a thing at least may be defined. Clarity on this subject might provide a basis for some constructive developments and explanations of rules of law. For instance, it might be argued that "bailment" is a thing *sui generis* and should not merely be treated as a form of contractual right. But on this foundation the restatement rejects the old-fashioned

(*a*) Volumes I and II (Introduction, Freehold Estates, Future Interests, Parts 1 and 2), compiled under the auspices of the American Law Institute and published by the Law Institute Publishers, St. Paul.

classification into rights, powers and interests and uses that are to be found in Hohfeld's Fundamental Legal Conceptions, which includes rights, privileges, powers and immunities. It is thought that Hohfeld was able by employing the wider categories to arrive at a far more accurate description of the legal characteristics of property. It is an interesting example of how the jurist may become the servant of the practical lawyer, if he will let him.

With regard to the definition of "estate" as an interest which may become possessory and is ownership measured in terms of duration, it is doubtful whether this would be acceptable to an English lawyer. But to-day with the frequent use of the term "equitable estate" the English expression has become lost in the mist of loose terminology.

Most of Volume I is concerned with "possessory" freehold estates, though this involves certain other definitions and classifications. It includes, for example, definitions of what are here called leasehold interests. The use of the expression "possessory" is in itself of interest. It has no counterpart in our technical terminology because it includes only freehold estates in physical occupation of the owner and, therefore, excludes freeholds subject to terms of years, though their general position is explained. The usefulness of such an addition to our terminology is illustrated by the fact that in contracts for sale it is necessary to stipulate expressly that land is sold with vacant possession. Much that appears in ordinary textbooks is misleading to the unlearned because it assumes the "possessory" interest. In practice a description of the rights of a freehold owner frequently convey title or nothing because the estate is "non-possessory".

It may be remarked in passing that probably many English lawyers would be surprised at the space devoted to "defeasible" estates in fee simple (80 pp. out of 430 pp. given to freehold possessory estates). In our textbooks there is a tendency to gloss over this aspect of the subject, which is generally regarded as of little importance. The expression "Fees simple defeasible" is in itself strange, including as it does conditional limitations (that much abused word according to Challis) and estates subject to a right of entry. Nevertheless it is a convenient term to distinguish these interests from the fee simple absolute, that is now the basis of English land law as the only legal estate of freehold. It also indicates the peculiar danger of statutory interference that one estate in fee simple "defeasible" is by the Law of Property Amendment Act, 1926, declared to be absolute.

Volume II includes some of the rules governing "Future Interests", including personal property. On this subject this

volume is incomplete and two more volumes are promised to complete this topic. It is, perhaps, a little surprising that in such an analytical piece of work the term "Future Interests" should be used so widely to include what we call reversions on a freehold and a possibility of reverter on a determinable fee simple. From one angle a reversion on a freehold estate is not an interest *in futuro* but a present interest. The interest of the reversioner is neither uncertain nor postponed; it is enjoyment of the land or the rents and profits of the land which is postponed. The real distinction between a vested or present estate to take effect in possession and a future estate which could vest only upon the happening of a future uncertain event was recognised by the old common law, which did not permit the transfer of contingent remainders by the ordinary methods of conveyance. Nevertheless the expression future estates has been recognised for some generations as a convenient term for estates postponed in enjoyment.

The rather unexpected use of the term Future Interests, however, is only precedent to a very considerable variation on the general terminology employed. The expression "contingent remainder" is entirely jettisoned on the ground that it has come to be so loosely used that it is incapable of adequate restriction. It is felt that this must represent the legal position on the other side of the Atlantic rather than in this country, where save for a few exceptional cases the precise rules governing the creation of legal remainders has tended to prevent any careless employment of the expression. Again, "reversionary interest" is defined to include a reversion and a possibility of reverter, while remainders can be (a) indefeasibly vested; or (b) vested subject to open; or (c) vested subject to complete defeasance; or (d) subject to a condition precedent.

It becomes immediately apparent that any English student of this part of the Restatement is faced with the accumulation of a new series of definitions and unfamiliar phraseology, and the divisions of the subject are equally unfamiliar. This last is due in part to the combination of the land law with free personalty, desirable enough in itself but somewhat difficult to apply to this branch of the law, and secondly the postponement to the next volume of the rules governing the construction of limitations and the rules for powers of appointment. The second peculiarity leaves the reader in a somewhat bewildered state, because he is expected to appreciate, for example, the rules of succession, waste, and statutes of limitation, before he has grasped exactly the content of the different definitions. This is

peculiarly noticeable under the head of "ineffectiveness of an interest". It must, however, be remembered that the Restatement must be taken as a whole when completed and that it is a work for the finished lawyer. It is not right, therefore, to criticise what may be clear enough where the matter can be viewed as a whole. No doubt the order of treatment was founded upon very adequate reasons.

Two other suggestions might here be made in this connection. The expression "vested" is frequently used, but does not seem anywhere to be completely defined, and there is a similar absence with regard to its correlative "contingent" though this is explicable enough. Likewise examples are given which involve class gifts, but the definition of a "class" has not been found by the writer. These matters afford considerable difficulty in English law, and an analysis would be very valuable. For example, an apparent illustration of a "remainder vested subject to open" is a class gift where at least one member of the class has fulfilled the requirements of vesting (see pp. 38, 552-553). This would almost certainly be classified as a contingent remainder in this country, and there seems to be reason since the extent of the interest taken by any member cannot be ascertained until the determination of the class: cf. *Symes* v. *Symes*, [1896] 1 Ch. 272. This is not to deny the validity of this new classification, which has much to commend it and indeed had it been earlier recognised might have modified the law. It is to suggest only the need for very clear cut definition.

It is not possible within the limits of available space to do justice to the monumental work we are now considering. What has been said is by way only of introduction to what is hoped will be a serious public, and to emphasise the need for which it stands and is intended to fulfil. As it so happens there is one sphere of English property law which offers scope for the warnings against loose terminology for which this work of the American Law Institute stands. There is a substantive law behind the principle of Registered Land Conveyancing. Much of its terminology is new and is capable of being wisely defined. Let us look to it that the best use is made of this opportunity.

H. Potter.

CONDITIONS OF SALE OF LAND.

By E. O. Walford, LL.D., Solicitor.

(*Continued from p.* 65.)

Title to Leaseholds.

By section 44 of the Law of Property Act, 1925, it is enacted as follows :—

(1) "Under a contract to grant or assign a term of years whether derived or to be derived out of freehold or leasehold land the intended lessee or assign shall not be entitled to call for the *freehold* reversion" : section 44 (2). This sub-section does not state that the lessee shall not be entitled to call for the title to the leasehold interest out of which the lease is to be derived.

(2) "Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion" : section 44 (3).

(3) "On a contract to grant a lease for a term of years to be derived out of a leasehold interest with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion" : section 44 (4).

The operation of these provisions is best shown by the following examples :—

(a) The freeholder grants a head lease to A. A cannot call for any title.

(b) If A sells to B then B can call for the head lease and any dealings with it.

(c) If B underlets to C, then C can call for the head lease, for this is the leasehold interest out of which the underlease is to be derived and not the leasehold reversion referred to in section 44 (4).

(d) If C grants a sub-underlease to D, then D can call for C's underlease and any dealings with it to be abstracted and produced, but cannot call for the head lease, which is the leasehold reversion referred to in section 44 (4).

(e) If C instead of granting a sub-underlease assigns his underlease to X, then X can call for C's underlease and any

dealings with it, but not the head lease, which is apparently the leasehold reversion referred to in section 44 (3).

The authority for the above propositions is *Gosling* v. *Woolf*, [1893] 1 Q. B. 39, as read with section 44.

As to the thirty years' title required to be deduced under section 44 (1) of the L. P. Act, 1925, it is well settled that if the lease is more than thirty years old the title after commencing with the lease can be taken up again with a clean assignment at least thirty years old: *Williams* v. *Spargo*, [1893] W. N. 100. No doubt a first mortgage of this age reciting that the leasehold term was vested in the mortgagor would be an equally satisfactory deed; but subject to the point that the interest is leasehold substantially the same considerations govern this question as those which govern the commencement of a freehold title, namely, that the thirty years' title should commence with an assurance for valuable consideration or a first mortgage or other dealing in connection with which it may be reasonably assumed that the prior title has been carefully investigated and all equitable interests got in, so far as they affect the title.

Section 44 (8) of the Law of Property Act, 1925, provides that a purchaser shall not be deemed to be or ever to have been affected with notice of any matter or thing of which, if he had investigated the title or made inquiries in regard to matters prior to the period of commencement of title fixed by this Act, or by any other statute, or by any rule of law, he might have had notice, unless he actually makes such investigation or inquiries.

Section 44 (5) of the same Act provides that where by reason of section 44 (2) (3) or (4) (set out above) an intending lessee or assign is not entitled to call for the title to the freehold or to a leasehold reversion, as the case may be, he shall not, where the contract is made after December 31, 1925, be deemed to be affected with notice of anything of which he might have had notice if he had contracted that such title should be furnished. The apparent intention of this provision was to reverse the rules laid down in such cases as *Patman* v. *Harland*, 17 Ch. D. 353, and *Imray* v. *Oakshette*, [1897] 2 Q. B. 218, to the effect that a purchaser ought expressly to stipulate for production of the deeds relating to the superior title and will be saddled with notice of what he would have discovered if he had investigated such title. It seems quite clear that the result is far short of such intention.

In the first place many thousands of land charges have no doubt since 1925 been registered under section 10 of the Land Charges Act, 1925, in respect of restrictive covenants affecting the

freehold. Such charges are self-advertising, as under section 198 of the Law of Property Act, 1925, the registration of such charges gives notice thereof " to all persons and for all purposes connected with the land affected ". There is no exception in this section in favour of lessees, nor any protection to lessees who pursuant to section 44 (5) of the Act have taken without notice of the title to the freehold or leasehold reversion. In short there appears to be a direct conflict between the two sections in this respect, and pending a direct decision upon the point the only judicial observation upon this question appears to be that of Mr. Justice Simonds in *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610 (see *ante*, pp. 69, 71), who stated that section 198 " appears, notwithstanding the unqualified language of section 44 (5), to affect a lessee with notice of all those charges which are registered under the Land Charges Act, 1925 ". Conveyancers must therefore at present act on the assumption that lessees are so affected, although it is possible that the Court may adopt what may be called a benevolent construction in favour of the lessee. It is, however, hardly likely that the freeholder will consider such an interpretation benevolent, as he may reasonably complain if the result is to render nugatory a restrictive covenant imposed for protecting the value of his adjoining land, and thus to saddle him with financial loss. It is also pointed out in this connection that section 199 (2) of the Law of Property Act, 1925, enacts that an earlier paragraph of that section freeing a purchaser from notice in respect of certain matters " shall not exempt a purchaser from any liability under, or any obligation to perform or observe any covenant, condition, provision or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if that paragraph had not been enacted ". The lessee cannot therefore derive any assistance from that section but must rely exclusively on section 44 (5).

As to registered land the case of *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610, already referred to above, is a direct decision that as to registered land a person taking a lease of such land is by virtue of section 50 (2) of the Land Registration Act, 1925, bound by restrictive covenants already registered in the charges register relating to the registered title. Section 44 (5) of the Law of Property Act, 1925, was referred to in argument; but Simonds, J., pointed out that section 20 of the Land Registration Act, 1925, provides that the interest of a lessee of registered land is subject to the incumbrances and other entries appearing on the

register (*i.e.*, of the freehold), and that once the entry is on the register it is notice to all the world.

It seems, therefore, that whether the lessor's title is registered or not, the purchaser's solicitor should endeavour to obtain information as to the lessor's title.

In the case of a lease of freehold land registered with an absolute title out of which the lease is to be granted direct to the lessee a provision that the lessor shall furnish an authority to inspect the register will no doubt often be sufficient for practical purposes, coupled with a provision that the consent of all incumbrancers shall be obtained, and a warranty that there are no entries on the charges register except in respect of such incumbrances. If it is disclosed that other entries do exist the authority to inspect the register should be asked for prior to contract so that it may be considered whether the matters noted in the entries will affect the proposed activities of the lessee. If the consideration is very substantial then, whether the title is registered or not, deduction of title at the lessor's expense should be requested, and cannot reasonably be refused in such a case as the transaction is in effect a sale carried out by way of lease. A similar requirement should be made in the case of a proposed building lease at a ground rent, for the lessee should be satisfied beyond question that the land on which he proposes to build belongs to the lessor, and that the lease will be valid. Obviously if the title is registered, but only with possessory title, the intended lessee should stipulate for deduction of title in the ordinary way.

Practical difficulties arise, however, where an existing lease is being purchased. The vendor may not have required deduction of the lessor's title, and the freeholder, when approached, may refuse to deduce title even at the vendor's or purchaser's expense. Such cases require tactful handling; but often what cannot be obtained as of right may be supplied as a matter of courtesy, and it will generally be possible to obtain at least production of the conveyance to the present owner of the freehold, or the land certificate, and a statement whether at the date of the lease the freehold was subject to any incumbrance, and if so whether the incumbrancer consented to the grant of the lease.

Very often, as the vendor will have no power to compel the deduction of his lessor's title, it will be necessary to obtain all available information before exchange of contracts.

If the lease has been granted, say, twenty years' ago, and no change of user is likely to be required there may be little practical risk in waiving all inquiries into the reversionary title; but if a change of user is contemplated either immediately or in the

future, it is clear that a serious risk is involved if the freehold title is not inquired into and as to unregistered land, appropriate searches made for land charges.

If the lease was granted before 1926 it must be remembered that the rule in *Patman* v. *Harland*, 17 Ch. D. 353, would have saddled the lessee and assignees of the lease with notice of the freehold title, and accordingly of all mortgages and restrictive covenants affecting it; but under section 44 (5) of the Law of Property Act, 1925, a person now purchasing such a lease will not be affected with notice of these matters except such as are properly registered as land charges under the Land Charges Act, 1925, after December 31, 1925. There may have been several changes in the ownership of the freehold since 1925, and if the purchaser is to be on safe ground he must ascertain and search against the person who was the owner of the freehold on December 31, 1925, and all subsequent owners of the freehold. In practice it will generally be difficult if not impossible to obtain this information, even in the form of a letter, and even more difficult to verify it. In fact the only satisfactory means of verification would be by obtaining an abstract of the title and examining the deeds. In practice, as is well recognised, this is generally impossible.

It would seem, subject to reasonable inquiries and efforts to obtain and verify information, that practitioners should advise the intending purchaser in such cases that there may be restrictive covenants or other matters affecting the freehold title, and of which he is technically saddled with notice; but that the vendor's solicitor, following common practice, refuses to afford facilities for inquiry into these matters. It will no doubt also be pointed out to the client that in practice a purchaser of a lease generally takes such risk as there may be in respect of these matters, upon the assumption that in most cases the freeholder has included in the lease any restrictions affecting the freehold.

It is now proposed to consider the provisions of the Law Society's Condition.

Law Society's Condition.

14.—Where the property is leasehold, the following provisions shall apply:—

(1) The title shall commence with the lease or underlease creating the term or interest sold.

(2) Such lease or underlease or an abstract or copy thereof may be inspected by the purchaser at the office of the

vendor's solicitors, for a period of seven days preceding the sale, and in the sale room at the time of sale, and the purchaser, whether he makes such inspection or not, shall be deemed to have notice of all the contents of the lease or underlease, and such notice shall not be affected by any partial, incomplete or inaccurate statement in the contract.

(3) Where the term or interest sold is created by an underlease—

(a) the purchaser shall be entitled to require the vendor to supply (at the purchaser's expense) an abstract or copy of the immediately superior lease, if any such abstract or copy is in the possession or control of the vendor or his trustee or mortgagee, but the vendor shall not be bound to verify such abstract or copy.

(b) whether such abstract or copy be supplied or not, the purchaser shall make no objection on the ground that the covenants and conditions in the underlease do not in all respects correspond with those in the superior lease (as appearing in such abstract or copy or otherwise), provided that the provisions of the underlease substantially give effect to the provisions of the superior lease (if and so far as so appearing).

If the transaction is by way of grant of a new lease and the consideration is substantial it may be regarded as settled practice to require the freeholder to deduce title to the freehold. It would be difficult to satisfy a client that his interests had been reasonably protected if after payment of say £1,000 for a lease of a house for 99 years at a ground rent, it was found that the lessor had no title. The explanation that "under the usual form of contract and even under an open contract the lessee is not entitled to call for the title to the freehold reversion" could hardly be regarded as a sufficient reply to the lessee's criticism. It might, perhaps, be a sufficient answer in law to an action for negligence; but this is not by any means clear, having regard to the decision of the Court of Appeal in *Imray* v. *Oakshette* (1897), 2 Q. B. 218, a case of an underlease, and the remarks of Rigby, L.J., in that case

to the effect that the intending underlessee should say that notwithstanding the terms of the statute, he must have reasonable production of the documents relating to the reversionary title. As has been stated above, a lessee or underlessee is by virtue of section 44 of the Law of Property Act, 1925, no longer deemed to have notice of any matter or thing which he would have discovered if he had investigated the title to the freehold, or in the case of an underlease the title to the freehold or any lease superior to that out of which the underlease is derived; but this will not give to a person who has no title any right to grant a lease of land which has never been conveyed to him, or to grant an underlease of land of which he holds no lease. For these reasons evidence of the vendor's title should be required, and a suitable special condition inserted. So far, all is clear enough; but when it becomes necessary to consider exactly what should be covered by the special condition in any given case the position becomes complicated by practical difficulties.

(1) If the lease is to be granted to the purchaser by a freeholder, there is no great difficulty, for the condition should provide that the lessor shall deduce a good and marketable title to the freehold in possession [free from incumbrances] *or* [and will procure the concurrence or consent in writing of all persons or corporations whose concurrence or consent may be necessary].

(2) If the lease which is being purchased is a lease already granted by the freeholder the position is rather more complicated. The leaseholder who is selling the lease may or may not be the original lessee, and may in either case have no particulars of the freeholder's title. If the lease was granted many years ago, say twenty years or upwards, it may be considered that from a practical point of view there is little risk of the lease being challenged, and that accordingly an investigation of the freehold title may be waived. If, however, the user proposed by the purchaser, though not prohibited by the terms of the lease, is not identical with the user previously obtaining, the purchaser should endeavour to obtain a provision in the contract that if the vendor shall be unable to obtain production to the purchaser of the title deeds relating to the freehold, or of an examined abstract thereof prior to the date fixed for completion, or if it shall appear from such deeds or otherwise that there are or may be any restrictions, charges or liabilities affecting the property and binding the lessee or constituting a charge upon the

leasehold interest or otherwise prejudicially affecting the leasehold interest or the value thereof, then the purchaser may rescind the contract.

(3) On the grant of an underlease it is clear that as the underlessee will have notice of the contents of the lease immediately superior to that out of which the underlease is derived (*ante*, p. 133), it should be provided by a special condition that a copy of such lease is to be supplied and that the original be produced for inspection. In practice it will generally be necessary to obtain the copy of the headlease before the contract, in order to agree the form of the proposed underlease.

It need hardly be said that before agreeing the contract for the grant or acquisition of an underlease the solicitor for the intending underlessee or purchaser should obtain full information as to the contents of the headlease. The following are examples of the difficulties which may arise :—

(a) If the headlease is at a higher rent and comprises only the same property, it is practically certain that if the underlessor incurs a forfeiture of the headlease the underlessee will only be granted relief upon the terms that he makes good the default, including payment of any arrears of rent, and thenceforth pays the higher rent.

(b) If the headlease comprises other properties in addition to that comprised in the underlease and the rent and covenants are not separately apportioned in respect of the property comprised in the underlease, then if the headlease becomes subject to forfeiture the underlessee may only be able to obtain relief upon the terms that he takes over the whole of the properties in the headlease for the remainder of the term of the underlease and makes good the breaches of covenant in respect of such properties. If substantial dilapidations have accrued the sum involved may be considerable, and possibly beyond the pocket of the underlessee. Moreover, if the term of the underlease is short it might not be an economic proposition to do this.

(c) If the superior lease is forfeited the superior lessor must be treated not only as having the rights of the headlessee whose interest has been forfeited but also as having his own rights by virtue of the forfeiture of the headlease : *Ewart* v. *Fryer*, [1901] 1 Ch. 499. It does not, therefore, follow that the Court will grant relief upon the terms that the underlessee steps into the shoes of the headlessee. If

the headlease was at £50 per year and the underlease at £150 per year it might be unfair to fix the future rent of the underlessee at £50 per year. The true rule as laid down in *Ewart* v. *Fryer* (*supra*) by the Court of Appeal is that both as to the rent and the covenants and conditions to be contained in the new lease to be granted to the underlessee the matter is to be dealt with in such a manner as will, in the opinion of the Court, do justice between the parties in the circumstances. The only fetter placed upon the Court is that imposed by section 146 (4) of the Law of Property Act, 1925, which prohibits the Court from granting to the underlessee a term greater than the remainder of the term of the underlease. By virtue of section 1 of the Law of Property (Amendment) Act, 1929 (putting right an oversight in the Act of 1925), relief *can* be granted to an underlessee in cases where no such relief could be granted to the headlessee; but it has been judicially stated that such relief will be granted sparingly : *Imray* v. *Oakshette*, [1897] 2 Q. B. 218. The provisions relating to such relief apply to leases at whatever date they have been granted.

In addition to the provision that a copy shall be supplied of the lease out of which the underlease is to be granted, the purchaser is entitled under an open contract, as has been mentioned above, to the deduction of the underlessor's title, *Gosling* v. *Woolf*, *supra*. Where a lease at a rack rent is being granted for residential purposes it will generally be found that the underlessor's solicitors are unwilling to deduce the title. In such cases it may be sufficient for practical purposes if the underlessor's solicitors certify that their client's title to the lease is good and marketable and that he has power without the concurrence of any other person to grant a lease in the form agreed. It is desirable to inquire particularly whether there is any mortgage of or charge upon the lease, as the idea appears to be prevalent that where property is merely charged in favour of a bank the consent of the bank is not necessary. Generally speaking, the consent of the bank is in fact necessary in order that a valid lease *effective against the bank* may be created. In cases where the proposed underlessee is paying a substantial premium, or a heavy rent in advance, or is proposing to expend a large sum of money upon repairs or alterations, or in any other case where heavy loss would be suffered by the underlessee if ousted during the term, it is submitted that the purchaser's solicitor should press for the formal deduction of the underlessor's title as one of the terms of the contract. It is not quite clear

whether the Law Society's Condition 14 is intended to apply to cases in which there is an agreement for the grant of an underlease of the whole of property held by the underlessor although Condition 25 deals with cases in which property is to be sub-demised subject to an apportioned rent. Condition 14 (1) can hardly be construed as meaning that the title of the person granting the underlease shall commence with the underlease which is to be granted to the purchaser, particularly as Condition 14 (2) states that such underlease or an abstract or copy thereof may be inspected at the office of the vendor's solicitors. On the other hand, Condition 14 (3) may well be construed as applying to all cases in which the transaction is to be carried out by the grant of an underlease, but it is not clear whether Condition 14 (3) is intended to deprive an intended underlessee of the right to require deduction of the underlessor's title to the lease held by him, as he is entitled to do under an open contract, *Gosling* v. *Woolf*, *supra*. It appears, if applicable, to prevent the purchaser from requiring an abstract or copy of the underlessor's lease unless the vendor or his trustee or mortgagee has one; but it does not deprive the underlessee of the right to call for production of the original lease. Such production need not be required for verification of the copy or abstract, but rather in compliance with the underlessor's obligations at common law. There appears to be nothing in the condition which precludes the proposed underlessee from requiring that the title to the lease subsequent to the lease itself should be abstracted and the original deeds produced. The result seems to be somewhat illogical. If Condition 14 (3) does not apply to cases in which the dealing is to be carried out by subdemise, then persons who are by virtue of special conditions to take an underlease of part of the property comprised in a lease and to whom Condition 25 will apply, appear as to deduction of title to be in the same position as persons who have agreed to take an underlease of the whole of the property comprised in the lease. It would seem that insufficient attention has been given to Condition 14 in relation to the cases referred to in Condition 25 and other cases in which an underlease is to be granted to the purchaser. It is suggested that this condition should be elaborated and revised, so as to show clearly what title is to be deduced in such cases, and in particular that :—

(a) Condition 14 (1) should provide that where the sale is to be carried out by way of underlease the title to the lease out of which the underleasehold term is to be derived shall be deduced.

(b) Condition 14 (3) should be revised so as to make it clear

that this paragraph does not apply to cases in which the sale is to be carried out by way of underlease.

Meanwhile, effect can readily be given to these suggestions by a special condition to the above effect.

(4) If the transaction is the sale of an existing underlease the observations above made as to the title which should be required to be deduced apply with equal force; but it will be found that paragraphs (1), (2) and (3) of Condition 14 apply to such cases quite clearly, and there is no difficulty in determining the effect of those paragraphs. It will have been noted from the illustrations given above that special provisions are necessary in such cases if the underlessee is to have the right to investigate the title to the superior lease or even if he is *definitely* to have a copy of the immediately superior lease (see Condition 14 (3) (a)). Although the original underlessee can require the underlessor to deduce his title, the purchaser of an underlease is debarred by section 44 (3) of the L. P. Act, 1925, from calling for the underlessor's title, in the absence of any special stipulation.

There are *dicta* in *Gosling* v. *Woolf*, [1893] 1 Q. B. 39, which countenance the view that on the sale of an underlease the purchaser may call for the title to the lease out of which the underlease is derived; but the view uniformly accepted by text-book writers is to the contrary. The latter view appears to be correct, for the superior lease is the leasehold reversion referred to in section 44 (3) of the L. P. Act, 1925. It will be noted that if the latter view is correct the draftsman could have expressed his intention much more simply by referring to "such leasehold interest" instead of using the words "the leasehold reversion", or by using the words "with a leasehold reversion" instead of "derived out of a leasehold interest in land"; but the only reasonable construction of the sub-section is that it prevents an assignee of a sub-lease from calling for the title to the leasehold reversion.

Where the property sold is held by underlease it is of great importance that the particulars should describe the property as being held under an "underlease" and not a "lease". The purchaser may otherwise refuse to proceed. The following decisions are examples of this rule:—

(1) Property described as a leasehold house. Purchaser held to be entitled to rescind and recover deposit upon objection taken that the property was part of a larger property comprised in two headleases, so that the purchaser's sub-lease would be jeopardised by breaches of covenant in respect of property not in the sub-lease agreed to be purchased: *Re Lloyds Bank, Ltd.*, [1912] 1 Ch. 601.

(2) A condition that errors shall not annul the sale, nor shall any compensation be paid in respect thereof, does not enable a vendor to force upon a purchaser an underlease : *Re Beyfus and Masters* (1883), 39 Ch. D. 110. This rule applies even if the conditions (as in the case of the National Conditions of Sale which are now so widely used by solicitors) give the purchaser the opportunity of inspecting the lease or underlease, state that he shall be deemed to purchase with full knowledge of the contents, and provide expressly that no objection shall be taken on account of the fact that the property is held by underlease. The particulars must disclose the underleasehold tenure. It is not sufficient for the vendor to show that although the general description was "leasehold property", a careful perusal of all the conditions would have revealed that the vendor was really offering an underlease : *Re Russ and Brown*, [1934] Ch. 34. Cf. the earlier case of *Camberwell, etc., Building Society* v. *Holloway* (1879), 13 Ch. D. 754, which must be regarded as of very doubtful authority, if not definitely overruled by *Re Beyfus and Masters*, and *Re Russ and Brown* (*supra*).

Law Society's Condition.

14.—(4) If the lease or underlease is dated more than thirty years before the date of the contract, the title shall be taken up again as provided by the contract, or, if no such provision is made, with an assignment or other disposition made not less than twenty years before such date; and a purchaser shall not be entitled to investigate or inquire into the intermediate title.

The effect of this paragraph of the Law Society's Conditions is rather peculiar. If the lease or underlease is dated more than thirty years before the contract and the contract is silent as to the document with which the title shall be taken up again, then the title must be taken up again with an assignment or other disposition made not less than twenty years before the date of the contract. Consequently, if the lease was made, say, twenty-eight years before the contract the full title must be deduced! If a twenty years' title is considered reasonable in the case of a lease upwards of thirty years old, it would seem, for practical purposes,

to be equally reasonable in the case of a lease between twenty and thirty years old. It may have been considered that some added security is afforded by reason of the subsistence in force of the lease for a longer period, even though the intermediate title is excluded.

In the case of an open contract the purchaser is entitled to call for an abstract of the lease, and the title must then be taken up with a document disposing of the whole legal and beneficial interest in the term dated at least thirty years before the contract: *Williams* v. *Spargo*, [1893] W. N. 100. If no such document exists the title must be deduced in full.

Law Society's Condition.

14.—(5) Where the lease or underlease is granted without reserving a rent or at a nominal rent, the fact of possession thereunder at the date of completion shall be accepted as conclusive evidence of the due performance or observance of the lessee's covenants and conditions therein contained.

The following statutory provisions should be noted in connection with this condition :—

"Where land sold is held by lease (other than an underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase" (L. P. Act, s. 45 (2)).

"Where land sold is held by underlease the purchaser shall assume, unless the contrary appears, that the underlease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the underlease before the date of the actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the underlease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease and all the covenants and provisions of

every superior lease have been paid and duly performed and observed up to that date" (L. P. Act, s. 45 (3)).

Condition 14 (5) leaves the position in cases where a rent other than a nominal rent is payable to be covered by the two sub-sections just quoted. Strictly, a peppercorn rent is not "paid", it is said to be "rendered". Accordingly, the statutory provisions do not in any event apply to such cases: *Re Moody & Yates* (1885), 30 Ch. D. 344.

It has been held that a receipt for payment of the rent to the superior lessor, even under threat of distress, is not a sufficient compliance with the statutory provision as to production of the last receipt: *Re Higgins & Percival* (1888), 57 L. J. Ch. 807. It has been suggested that a receipt given by the superior landlord to the undertenant for rent paid by the latter pursuant to section 6 of the Distress Amendment Act, 1908, would comply with this statutory provision: Seaborne (9th ed.), p. 242. This does not seem to be a justifiable deduction. No presumption of performance of the covenants of the lease should be inferred from a payment made to the superior lessor.

It will be seen that where the statutory provisions apply the production of the last receipt for rent is only conclusive evidence "unless the contrary appears"; whereas these words are absent from the Law Society's Condition 14 (5). It is therefore useful to consider the effect of omitting these words. First it may be mentioned that a vendor cannot cover breaches of covenant giving rise to a right of forfeiture, and committed after the date of the contract by a condition making the receipt conclusive evidence of compliance with the terms of the lease "up to the completion of the sale": *Howell* v. *Kightley* (1856), 21 Beav. 331; 25 L. J. Ch. 868. On the other hand, a condition making the production of the last receipt conclusive evidence that all the covenants have been performed precludes the purchaser from raising any requisition or objection on the ground that the repairing covenants have not been complied with, even though it is common ground that such non-compliance brings into operation the proviso for re-entry: *Bull* v. *Hutchens* (1863), 32 Beav. 615, and cf. *Howell* v. *Kightley*, *supra*, at pp. 336, and *Laurie* v. *Lees* (1880), 14 Ch. D. 249.

It would also appear from *Howell* v. *Kightley* (*supra*) that the Court would probably refuse to decree specific performance in spite of such a condition if it were clear that the lessor intended to proceed to forfeiture of the lease by reason of the breaches discovered. In the case of *Ringer to Thompson* (1881), 51 L. J. Ch. 42, decided under the common law, the lessor had commenced

proceedings in respect of alleged breaches but failed to pursue the action, and the purchaser was compelled to accept the title upon an affidavit being made by the vendor that he had in fact complied with the terms of the lease, the purchaser offering no evidence of any subsisting breaches. There was, however, no condition in this case as to the receipt for rent being evidence of performance of the covenants.

The more recent case of *Beyfus* v. *Lodge*, *infra*, is particularly instructive. One of the conditions of sale stated that the production of the last receipt for rent should be conclusive evidence of compliance with the covenants in the lease. Another condition required the purchaser to comply with any outstanding notices. No notices were disclosed, but, in fact, dilapidation notices had been served. The vendors' solicitors, replying in good faith to requisitions, erroneously stated that no notices were outstanding. The error being discovered, they then sent to the purchaser's solicitors copies of the notices; but the purchaser required the vendors to comply with the notices before completion, whereupon the vendors sued the purchaser for specific performance.

It was held that neither of the two conditions mentioned above were sufficient to entitle the vendors to an order for specific performance. The non-disclosure of the notices, which contained material facts, was sufficient to debar the vendors from the equitable remedy of specific performance. The first condition did not assist, as it required the purchaser to assume something which the vendors knew to be untrue. The second condition was equally useless because it stated as a contingency something which the vendors knew to be a fact. At law, however, the condition was held to be binding on the purchaser, with the result that he was unable to recover his deposit, or the costs of investigating the title : *Beyfus* v. *Lodge*, [1925] Ch. 350. This case was decided prior to the coming into force of the L. P. Act, 1925, and it is quite possible that the Court would now, in such a case, order the return of the deposit under section 49 of that Act; but it would seem that the purchaser in any such proceedings may still be unable to recover the costs of investigating title, since he is bound at law by the conditions, and the section does not extend to the award of such costs.

Where the statutory provision applies the position of the purchaser is more satisfactory. In that case the receipt for rent only being evidence of compliance with the covenants and conditions of the lease " unless the contrary appears ", express evidence of a breach will dispose of the condition completely, with the result that the purchaser can set up the breach of covenant as a defence

not only in equity (*e.g.*, as a defence to proceedings for specific performance), but also at law : *Re Highett and Bird*, [1903] 1 Ch. 287. In that case the Court went further and held, although there was only an open contract, and the vendor had agreed to accept a reduced price on account of the condition of the property, that the vendor was bound to prove that he had performed the covenants of the lease, in order to establish a good title. It is, however, clear that this proposition is not supported by the earlier authorities, and cannot be reconciled with the observations of Fry, J., in the case of *Re Gloag and Miller* (1883), 23 Ch. D. 320, as follows : " When the contract is silent as to the title to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not make a good title. If the vendor, before the execution of the contract, said to the purchaser, ' I cannot make out a perfect title to the property ', this notice would repel the purchaser's right to require a good title to be shown. But if the contract expressly provides that a good title shall be shown, then inasmuch as a notice by the vendor that he could not show a good title would be *inconsistent with the contract*, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser he would still be entitled to insist on a good title."

It is submitted that the foregoing passage correctly states the law, and this view is reinforced by the fact that Romer, L.J., in the later decision of *Re Allen and Driscoll's Contract*, [1904] 2 Ch. 231, referring to *Re Highett and Bird* and to the fact that he was a party to that decision, observed that the attention of the Court was not directed to the point that there was no express agreement to show a good title. His Lordship then added: " The arguments proceeded on the assumption that the vendor was in the same position as if he had expressly agreed to make a good title. The case was decided on that footing, and it is not to be taken as an authority for any case in which there is not an express contract by the vendor to make a good title."

The result of the authorities may be stated as follows:—

(1) *Express contract to make a good title.*

Whether the defect is removable or irremovable, the vendor cannot escape his obligation to make a good title by showing that the purchaser was aware of the defect before contract; and if the

defect is remediable evidence of notice that the vendor refused to make it good is not receivable: *Re Gloag and Miller* (1883), 23 Ch. D. 320.

(2) *Contract silent as to title.*

(a) If the defect is irremovable then if it is shown that the purchaser had notice of such defect before contract the implied obligation of the vendor to make a good title will be discharged: *Re Gloag and Miller* (*supra*).

(b) If the defect is removable the fact that the purchaser had notice of the defect will not discharge the vendor from his implied obligation to make a good title, as the purchaser is entitled to assume that the vendor will make good the defect before completion of the purchase: *Barnett* v. *Wheeler*, 7 M. & W. 364.

It must be emphasised that the foregoing propositions are subject to any express provisions in the contract itself. A leasehold property was sold under contract which was silent as to the title; but it was agreed that the sale was subject to a certain licence to assign and to the property being taken *in their present condition*. On application for the landlord's consent to the assignment, a schedule of dilapidations was served, the landlord refusing to grant the licence until the works were executed. The purchasers refused to carry out these works and the vendors thereupon executed them at substantial cost. In the proceedings which followed the purchasers claimed that *Re Highett and Bird* (*supra*) applied, and that the vendors were accordingly bound at their own expense to carry out the works in order to make a good title. This argument did not prevail with the Court. It was held that under the contract to take the property in its then condition the vendors as trustees of the property for the purchaser were entitled to carry out the works and to recover the expense incurred from the purchaser, and were also entitled to an order for specific performance on that basis: *Lockharts* v. *Rosen*, [1922] 1 Ch. 433. It is suggested that where the arrangement is that the purchaser shall take the property in its present condition, or subject to an existing notice from the landlord or from any authority or subject to any other defect in title the most suitable course is to insert a condition in the following terms :—

"The property is sold [in its present condition] *or* [subject to an outstanding notice dated the —— day of —— relating to —— served by ——]. The purchaser shall make no requisition

or objection in respect thereof, and the following provisions shall apply :—

" (a) The purchaser will in the assurance of the property indemnify the vendor and his estate and effects from and against all subsisting or future liabilities arising out of such [condition] [notice].

" (b) The Assignment [Transfer] to the purchaser shall contain a declaration negativing any implied covenant by the vendor that the covenants contained in the lease and relating to the repair, decoration or condition of the property agreed to be sold have been performed.

[The foregoing provision (b) will only be necessary if the vendor is to assign or transfer " as Beneficial Owner ", as otherwise no such implied covenant will arise.]

" (c) On completion the purchaser will repay to the vendor together with the balance of the purchase-money all reasonable sums which the vendor shall have expended in complying with such notice (either wholly or partially) with interest on each sum at £[4] per centum per annum from the date of payment thereof Provided that the purchaser shall not be liable to make any repayment under this sub-clause unless the vendor shall have informed him of the contents of such notice and given to him the option of complying therewith and shall not have refused any proper facilities for so doing."

Compare clause 20 of the Law Society's Conditions which deals with notices served *after* the date of the contract in a very similar manner. It appears desirable that the provision above set out should be inserted in addition to paragraph (5) of clause 17 of the Law Society's Conditions where the property sold is leasehold. That paragraph merely states that the purchaser shall be deemed to purchase with full notice of the actual state and condition of the property as to (*inter alia*) repair, and shall take the same as it stands.

It is suggested that even where the property is sold subject to any such matters as above mentioned the vendor should in the case of leasehold property, have the right, as above reserved, to carry out the work, in order to prevent a forfeiture of the lease. It does not necessarily follow that the purchaser will complete, and if he should not and could not do so, the vendor, if allowing the lease to be forfeited owing to breaches of covenant, would be seriously prejudiced. In the absence of any special provision that the purchaser is to take the property in its present condition, it would seem clear that the vendor who is a constructive trustee

of the property, though not so heavily burdened as an express trustee (*Plews* v. *Samuel*, [1904] 1 Ch. 464), must take as good care of the property as a prudent owner would take of his own property: *Wilson* v. *Clapham* (1819), 1 Jac. & W. 36. It was suggested by Kekewich, J., in *Bolton Partners* v. *Lambert* (1888), 41 Ch. D. 295, that where vendors pay moneys "entirely unremunerative to them" in maintaining the property in its present condition they have a claim against the purchaser in respect of moneys so expended. This is doubtful. The same learned Judge in *Royal Bristol, etc., Building Society* v. *Bomash* (1887), 35 Ch. D. 390, recognised the accepted rule that in the absence of any provision in the contract the vendor is bound to keep the property in a reasonable state of repair at least up to the date fixed for completion, so that the purchaser may take the thing which he has contracted to buy. Cf. *Phillips* v. *Silvester*, *infra*, and *Regent's Canal Co.* v. *Ware* (1857), 23 Beav. 575. As to cases of very dilapidated property sold under a contract not regulating the position, probably the vendor can require the purchaser to decide whether he will provide the necessary funds or allow the dilapidation to continue: *per* Lord Selborne, in *Phillips* v. *Silvester* (1872), L. R. 8 Ch. App. 173. Further, the vendor may, under an open contract, if a good title has been shown, determine his obligation to maintain the property by offering to the purchaser possession of the property pending completion, although he must not require payment of the purchase as a condition of this concession: *ibid.*

In the case of leasehold property it is to be remembered that the vendor's obligation under an open contract is to perform fully the covenants of the lease at his own expense up to the date when a good title is made, or where the date for completion is fixed then up to that date: *Re Highett and Bird* (*supra*), *Palmer* v. *Goren* (1856), 25 L. J. Ch. 841; *Dowson* v. *Solomon* (1859), 1 Drew. & Sm. 1.

There can be little doubt that the vendor of a leasehold property is entitled (in the absence of any other provision in the contract) after the date fixed for completion, and prior to actual completion, to comply with a dilapidation schedule served upon him, in order to protect his own interests as unpaid vendor where the contract is silent upon this point. As has been judicially observed, a vendor is not a mere dormant trustee. He is "a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it": *per* Lord Cairns in *Shaw* v. *Foster* (1872), L. R. 5 H. L. 321. His Lordship continued: "The

relation therefore of trustee and *cestui que trust* subsisted but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."

Where leasehold property is sold in its present condition it should be remembered that the assignment of the property by the vendor " as beneficial owner " will imply a covenant by the vendor that the covenants have been performed up to the time of the assignment: hence the qualification introduced in the special condition set out above in relation to the sale of property subject to notices received from the lessor or any authority.

Law Society's Condition.

14.—(6) No evidence, besides the evidence, if any, in the possession or control of the vendor or his trustee or mortgagee, shall be required of the title or authority of the person giving the receipts for rent respectively referred to in sub-sections (2) and (3) of section 45 of the Law of Property Act, 1925.

The effect of this paragraph is that the purchaser is bound to assume *prima facie* that the person giving the receipt for the last payment due for rent under the lease or underlease sold is entitled to give such receipt. The purchaser is not precluded from showing *aliunde* that the person giving the receipt is in fact not entitled to do so. He is merely debarred from " requiring evidence " of that person's authority. It has been held in an unreported case before Vice-Chancellor Kindersley on July 31, 1866, referred to in Dart on Vendor and Purchaser, that if a waiver of a breach of covenant is relied upon by the vendor under the contract and the person giving it is not the original lessor, a condition debarring the purchaser from investigating the lessor's title will not preclude the purchaser from requiring the title to be deduced from the original lessor to the person whose breach of covenant is relied upon. And generally it would seem that in the absence of any condition, if the title of the supposed landlord is doubtful the Court will not force the title on the purchaser: *Pegler* v. *White* (1864), 33 Beav. 403. On the other hand if no such doubt is shown to exist as to the title of the person giving the receipt, the purchaser under an open contract cannot require deduction of the title to the reversion, and therefore it would seem that the purchaser cannot require that the right of the person giving the receipt should be established in such cases, as this could only be proved by such deduction.

Law Society's Condition.

14.—(7) Where the lease or underlease, under which the property is held, is subject to a restriction (not removed by statute) against assignment without licence—

(a) the vendor shall, immediately after the date of the contract, at his own cost, apply for and endeavour to obtain the necessary licence;

(b) the purchaser shall perform any reasonable condition, required by the reversioner, before granting the licence, to show that the purchaser will be a satisfactory tenant.

If the vendor is unable to obtain the licence within three months from the date of the contract, either party may, by notice in writing to the other party or his solicitors, rescind the contract, and thereupon the provisions of Condition 10 (2) shall apply as if the contract had been rescinded by the vendor under Condition 10 (1).

In the absence of any stipulation to the contrary the vendor is under an obligation to obtain the consent of the lessor to the assignment to the purchaser, as it is his duty to do all things necessary to make the assignment to the purchaser valid and effective, and, as has been stated above, to perform and observe the lessee's obligations up to the date for completion, although not up to the date of actual completion if the purchaser is in default: *Winter* v. *Dumerque* (1866), 12 Jur. (N.S.) 726; *Mason* v. *Corder* (1816), 7 Taunt. 9. If the vendor is unable to obtain the lessor's consent he is not bound to institute legal proceedings to compel the grant of the licence (*Lehmann* v. *McArthur* (1868), 3 Ch. App. 496); but if he deliberately persuades the lessor to refuse consent he will be liable not only to return the deposit with interest and to pay the purchaser's costs of investigating the title, but also for any loss directly sustained by the purchaser through loss of the bargain: *Day* v. *Singleton*, [1899] 2 Ch. 320. The purchaser must, however, be careful not to rescind before the date fixed for completion unless he is informed unequivocally by the vendor that he will be unable to complete the sale owing to his inability to obtain the lessor's consent. Otherwise he may be held to have rescinded prematurely and to be liable in damages: *Ellis* v. *Rogers* (1885), 29 Ch. D. 661. If the licence has been obtained

meanwhile he may be ordered specifically to perform the contract, and to pay the costs of the action.

As time is not normally of the essence of the contract it is suggested, in all cases where inconvenience would be occasioned to the purchaser by delay beyond a given date, that either party should be given the right to rescind and to receive back his deposit if the licence is not granted by that date, time to be made of the essence of this stipulation. The period specified in the Law Society's Condition is three months from the contract date. When these Conditions are adopted it should be ascertained whether this period is acceptable to the client (be he vendor or purchaser). It is quite likely that in ordinary cases neither party will wish to leave the matter *in vacuo* for so long a period. Generally a margin of fourteen days after the date fixed for completion should be sufficient. Although the Law Society's Condition does not state that time is of the essence of the provision as to rescission, it is suggested that this provision would generally be so construed, as it is reasonable to presume that the period is fixed either as establishing a maximum period beyond the nominal date agreed upon for completion of the purchase or (if expiring before the date fixed for completion) a minimum period between the date when the licence is to be obtained and the purchaser is due to complete. If the date fixed for completion coincides with the date by which the licence is to be obtained the position is not so clear; but it is submitted that normally if the parties agree to an express right of rescission by reference to a specific period or date, time would be of the essence of such a provision. It would, however, seem desirable to add to the Law Society's Condition an express statement that time is of the essence of the condition in all cases.

The reference in the Law Society's Condition 14 (7) to restrictions against assignment "not removed by statute" is no doubt to section 19 (1) of the Landlord and Tenant Act, which provides that if the lease is for more than forty years, and is made in consideration wholly or partially of the erection or the substantial improvement, addition or alteration of buildings, then, notwithstanding any stipulation to the contrary, no consent is necessary to an assignment effected more than seven years before the end of the term, where the lease prohibits such assignment *without the consent of the lessor* (and not absolutely). This exemption does not apply if the lessor is a Government Department or local or public authority or a statutory or public utility company (as defined in the Act).

Section 19 (1) of the Landlord and Tenant Act, 1927, also provides as follows. Whether the lease is made before or after

the commencement of the Act any covenant against assigning the demised premises *without the lessor's consent* is to be read subject to a proviso that such consent is not to be unreasonably withheld, and this proviso is to be read into the covenant notwithstanding any stipulation to the contrary. If the words italicised are omitted, and there is an absolute covenant against assignment, however, the sub-section does not apply. This is clear from the observations of Mr. Justice Clauson in *Woolworth* v. *Lambert*, [1936] 1 Ch. 415, and Romer, L.J. (on appeal), [1937] 1 Ch. 37, a case dealing with an exactly similar proviso regarding the withholding of consent to alleged "improvements" contained in section 19 (2) of the same Act.

What is to happen if the contract is an open contract and the vendor withholds his consent either unreasonably or upon grounds of doubtful validity? According to the old case of *White* v. *Hay* (1895), 72 L. T. 281, the title will be forced upon the purchaser if the lessor's consent is not to be withheld in the case of a responsible assignee, and the Court is satisfied that the purchaser answers that description. It is, however, clear that the Court considered that no doubt existed upon this point, and that the purchaser would accordingly incur no risk by completing. In *Re Marshall and Salt*, [1900] 2 Ch. 202, there was also an open contract, and the lessor refused to consent to the assignment of the property, a public-house, to the purchasers, who were brewers, upon the ground that he did not wish the house to become "tied" to brewers, but desired that it should remain a free house. The Court refused to force the title on the purchasers. Whilst the purchasers' refusal to accept an assignment appears to have been taken by the Court in this case as an indication that the lessor's refusal of consent was not unreasonable, this does not appear to be a justifiable conclusion. Sometimes conditions of sale are prepared on the footing that if the vendor refuses his consent the purchaser may if he thinks fit take an assignment upon being indemnified by the vendor against any loss or damages which he may sustain by taking the assignment without the lessor's consent; but such a course is generally unsatisfactory both to the vendor and the purchaser and cannot be recommended. The appropriate course in such cases is for the vendor to apply for a declaration that the lessor's consent is unreasonably withheld, as in *Young* v. *Ashley Gardens Properties, Ltd.*, [1903] 2 Ch. 112. It is suggested that *White* v. *Hay*, *supra*, depended upon very special circumstances, and a vendor under an open contract would be well advised, in a reasonably clear case, to apply for such a declaration as last mentioned if time permits, or is extended suitably by agreement with the purchaser, as the

Court may award the costs of the proceedings to the vendor if he is successful : *West* v. *Gwynne*, [1911] 2 Ch. 1.

Where the Court holds on a vendor and purchaser summons that the title cannot be forced upon the purchaser the vendor will generally be ordered to repay the deposit with interest at £4 per cent. per annum and also the purchaser's expenses in relation to the investigation of title : *Re Marshall and Salt* (*supra*); *Re Hargreaves and Thompson* (1886), 32 Ch. D. 454. For this reason in contracts drawn carefully on the vendor's behalf it will be found, as in the Law Society's Condition, that the vendor is declared to be entitled to rescind upon the terms that the deposit is repaid " without interest costs or compensation ".

As to the obligations dealt with in the Law Society's Condition 14 (7) (a) and (b) it is suggested that the vendor and purchaser would be under similar obligations in the case of an open contract.

Law Society's Condition.

Registration of Memorials.

15.—(1) Save as hereinafter provided, no objection shall be made on account of a memorial of a document dated more than twelve years before the date of the contract, not being registered in a local deeds registry.

(2) This condition shall not apply to a puisne mortgage (within the meaning of the Land Charges Act, 1925, whether made before or after the commencement of that Act) if title is being made thereunder and the same is not registered as a land charge.

Generally, where the vendor knows of specific defects in the title he cannot cloak them effectively by a general condition applying to any defects of that kind, but must disclose at least all facts which are material to enable the purchaser to determine whether or not he will buy the property. It has, however, been held that a condition debarring a purchaser from objecting to the title on the ground that any document is not registered in the Middlesex Registry is effective, although the vendor was aware that such an unregistered document existed : *Girling* v. *Girling*, [1886] W. N. 18.

Paragraph (1) of the above condition refers only to documents not registered in a local deeds registry, *i.e.*, in the Middlesex or Yorkshire Registry. It does not prevent the purchaser from

objecting to non-registration in the Land Charges Registry of documents which should have been registered as land charges. Further, it excludes objection only if the deed which was not registered in the Middlesex or Yorkshire Registry was dated upwards of twelve years before the contract. It is suggested that a prudent purchaser would inquire as to the date and exact nature of any unregistered documents before willingly accepting this condition. On any proposed sale or mortgage the intending purchaser or mortgagee might well insist upon the registration being effected, although it is difficult to think that such registration could really serve a useful purpose except in a case in which the assurance to the vendor or proposed mortgagor had not been registered.

(i) *Middlesex Registration.*

Generally, persons acquiring legal estates or lending money on legal or equitable mortgage inspect the title deeds, and as, in accordance with the doctrine in *Le Neve* v. *Le Neve* (1747), 3 Atk. 646, registration in the Middlesex Registry of a later deed by a person who has notice of an earlier unregistered deed does not confer priority, the risk in relation to unregistered deeds forming part of the title is not, perhaps, very substantial.

It should not be forgotten that it is not "necessary or permissible" to register a memorial of any instrument in the Middlesex Registry if dated after the appointed day, *i.e.*, January 1, 1937, Land Registration Act, 1936, s. 2 (2), and no memorial of any other instrument is to be registered after December 31, 1938, s. 2 (3). As to such documents, *i.e.*, documents which should have been registered and are dated on or before January 1, 1937, nothing in the Act affects the consequences flowing from failure to register : *ibid.*, s. 2 (3). By section 3 (4) it is provided (in effect) that discharges of mortgages dated before or on January 1, 1937 (whether such discharges are dated before or after January 1, 1937), may be registered; but no entry of such discharges can be made after December 31, 1938.

(ii) *Yorkshire Registration.*

The doctrine of *Le Neve* v. *Le Neve* does not prevail in relation to land in Yorkshire. Under the Yorkshire Registries Act, 1884, s. 14, assurances registrable under that Act have priority according to date of registration, and such priority is not lost by actual or constructive notice of an earlier unregistered deed.

It is accordingly suggested that a very careful purchaser of land within the Yorkshire registration areas would possibly refuse

to accept such a condition. In practice registration of the assurance to the purchaser would probably not be made on the same day as the completion of the purchase, and the risk involved is that an intervening incumbrance or conveyance might gain priority by registration immediately after completion and prior to the presentation of the conveyance. In this case the registration of the conveyance or mortgage under which the vendor is selling would seem essential for the complete protection of the purchaser although admittedly the likelihood of any such intermediate registration is small.

(iii) *Land Charge Registrations.*

(a) *General.*

In explanation of Condition 15 (2) it should be mentioned that a "puisne mortgage" within the meaning of the Land Charges Act, 1925, s. 10 (1), Class C (i), is any legal mortgage, *i.e.*, a mortgage by demise or sub-demise or a charge by way of legal mortgage (L. P. A., 1925, s. 205 (1) (xvi))—

(a) not protected by a deposit of the documents relating to the legal estate; *and*

(b) if the land is in the area of a local deeds registry—not registered in that registry.

(See Land Charges Act, 1925, s. 10.)

Hence a "puisne mortgage" does not include (for our present purpose) either an ordinary equitable mortgage (whether accompanied by deposit of the title deeds or not), or any mortgage registered in the Middlesex or Yorkshire Registry. Condition 15 (2) does not apply to these two classes of mortgage.

Such charges are, however, registrable as land charges under the Land Charges Act, as "general equitable charges", *i.e.*, equitable charges "not secured by a deposit of documents relating to the legal estate affected" and not arising or affecting an interest arising under a trust for sale or a settlement, and not included in any other class of land charge: section 10 (1), Class C (iii).

Where title is made under a deed coming within either of these classes it would therefore seem that the purchaser should insist on registration in the appropriate registry before completion, namely, in the case of an equitable charge (not secured by deposit of documents) as "a general equitable charge" under section 10 of the L. C. Act, 1925, or, in the case of a legal mortgage, not secured by deposit of documents in the Middlesex or Yorkshire registration areas, in the appropriate registry. The percentage of cases in

which equitable mortgagees sell is very small, as in so many cases they have no power to convey the legal estate.

The Land Charges Act, 1925, s. 18, enacts that it is not necessary to register in the Middlesex Registry " general equitable charges " if dated after December 31, 1925, but " puisne mortgages " are expressly excepted from this section. They must therefore be registered in Middlesex in order to afford protection against subsequent registered dealings. There is a distinction between the Middlesex and Yorkshire Registries in respect of " general equitable charges ". Although such charges cannot be registered in the Middlesex Registry (L. P. Act, 1925, s. 11) but must accordingly be registered as land charges under the L. C. Act, 1925, section 10 (6) of that Act expressly provides that in the case of a general equitable charge affecting land in the Yorkshire registration areas registration is to be effected in the Yorkshire Registry : see Schedule, L. P. (Amendment) Act, 1926.

An equitable charge secured by deposit of documents and being a " general equitable charge " may well contain a power of attorney enabling the equitable mortgagee to convey the legal estate. The purchaser acquiring title under such a charge would hardly be able to put the title in order after completion if the charge were not registered before completion. By virtue of section 13 (2) of the L. C. Act, 1925, the charge would be void as against a purchaser of the land charged therewith unless registered before completion. The term " void *against* a purchaser " can hardly apply to a case where the purchaser claims under and by virtue of the charge. The alternative is that the charge and the conveyance thereunder are void against a subsequent purchaser from, say, the mortgagor. This, in turn, depends upon whether the first purchaser does get the legal estate by virtue of the power of attorney, or whether that power, contained in the charge, is also void : a difficult question. If the purchaser completes the purchase he cannot apparently rectify the title, as the land charge must be registered against the estate owner affected by the land charge, and after completion there will be no such person.

As noted above, the Law Society's Condition does not preclude objection to the title on account of the non-registration of land charges, and the foregoing observations merely serve as a warning against the acceptance of any condition which does preclude such objection.

(b) *Registered land.*

The registration of a land charge is unnecessary in respect of any transaction which can be protected under the Land

Registration Act, 1925, by a creditor's notice, restriction, caution, inhibition or other notice.

(c) *Land Charges affecting land in Middlesex.*

(i) *Puisne Mortgages.*—See definition of "puisne mortgage" above. Where any such mortgage is registered in the Middlesex Registry it is unnecessary to register it in the Land Charges Register, L. C. Act, 1925, s. 10. Such mortgages presumably *can* be registered in that Register. If dated before January 2, 1937, however, they *must* be registered in the Middlesex Deeds Registry (not being exempted from such registration by the L. C. Act, 1925, or by the L. P. Act, 1925, s. 11). There is therefore no point in registering them in the Land Charges Register as well. Any such document dated *after* January 1, 1937, probably must be registered in the Land Charges Register, as registration in Middlesex of such deeds is no longer permitted : L. R. Act, 1936, s. 2 (*supra*).

(ii) *General equitable charges.*—See definition above. These must be registered in the Land Charges Register, L. C. Act, 1925, s. 10.

They have a threefold exemption from registration in the Middlesex Deeds Registry—

(a) They do not create or transfer a legal estate (see L. P. Act, 1925, s. 11).

(b) They are expressly exempted from such registration by the L. C. Act, 1925, s. 18.

(c) If dated after January 1, 1937, they *cannot* be so registered, L. R. Act, 1936, s. 2.

(d) *Land Charges affecting land in Yorkshire.*

(i) *Puisne Mortgages.*—These are registrable in the Land Charges Register only if not registered in the Yorkshire Registry, L. C. Act, 1925, s. 10. As registration in the Yorkshire Registry is still requisite under the Yorkshire Registries Act, 1884, the L. P. Act, 1925, s. 11, not exempting such mortgages from registration, there would seem to be no point in effecting registration in the Land Charges Register.

(ii) *General Equitable Charges.*—Registration of general equitable charges affecting land in the Yorkshire Ridings is to be effected in the appropriate Yorkshire Ridings Registry, L. P. A. (Amendment) Act, 1926, Schedule, enacted in substitution for section 10 (6) of the L. C. Act, 1925.

Law Society's Condition.

BUILDING AND OTHER SOCIETIES.

16.—Where a title includes a security or other assurance in favour of a Building or Friendly Society or a society registered under the Industrial and Provident Societies Acts, or any trustees or other persons on behalf of such a society, no evidence shall be required in relation to the rules, constitution or incorporation of the society, and the purchaser shall assume that any receipt given on the discharge of every such security and purporting to be executed in the manner required by the statute relating to the society was duly executed by all proper persons and was valid and effectual.

In general, where the vendor is a corporation or other body constituting a legal entity, the purchaser is concerned to see that such a vendor has power by virtue of its constitution to hold and dispose of land. It would be out of place here to deal with this subject, which is a pure matter of conveyancing, and not normally the subject of conditions of sale. It is, however, relevant to mention that by virtue of section 74 of the Law of Property Act, 1925, a deed executed on or after January 1, 1926, is deemed, in favour of a purchaser, to have been duly executed by a corporation aggregate if a seal purporting to be its seal is affixed in the presence of its clerk, secretary or other permanent officer or his deputy and a member of the board of directors, council or other governing body. The requirements of the section are deemed to be complied with if persons purporting to hold such offices have attested the sealing.

Notwithstanding this provision, any mode of execution which is in accordance with the constitution of the corporation is equally effective: section 74 (6).

Section 74 also contains other useful provisions as to the signature of documents not under seal, and as to powers of attorney in connection with documents signed or executed on behalf of corporations.

The Condition above set out is, in substance, a common condition. It covers two points:—

(1) It prevents the purchaser from requiring evidence of the rules, constitution or incorporation of the societies referred to. It does not preclude the purchaser from showing *aliunde* that the title is bad, for example, on account of the fact that a transaction was *ultra vires*. Thus, in the

case of a building society its sole authority to hold land might rest upon section 13 of the Building Societies Act, 1874 (which enables such societies to hold mortgages of land, and to acquire title thereto by foreclosure), and section 37 of the same Act (which enables such societies to hold land or buildings for conducting its business). If such a society were to make title to, say, a block of dwelling-houses under an ordinary conveyance to the society the purchaser would be entitled to object to the title on the ground that the conveyance to the society was apparently void.

In practice evidence as to the rules or constitution of such bodies is not usually required, and the condition is therefore unlikely to prejudice a purchaser.

(2) The condition also requires the purchaser to assume that any receipt given on the discharge of a mortgage to any such society as therein mentioned is valid; but only if it purports to be executed in the manner required by statute. Thus, forms of statutory receipt are scheduled to the Acts relating to such societies, *e.g.*, Building Societies Act, 1874, s. 42; Friendly Societies Act, 1896, s. 53; and Industrial and Provident Societies Act, 1893, s. 43. The purchaser must satisfy himself that the receipt, if operating under any of those Acts, is in proper form and, if not, may object to the title whether this condition is incorporated or not.

The forms last mentioned are not, however, compulsory. There is nothing to prevent any of the societies from joining in the conveyance to the purchaser or executing a reconveyance in ordinary form. Moreover, section 115 of the L. P. Act, 1925, which prescribes a *permitted* form of reconveyance by indorsed receipt for all mortgages, states that the provisions of that section relating to the operation of the receipt shall (in substitution for the like statutory provisions relating to receipts given by a building, friendly, industrial or provident society) apply to the discharge of a mortgage to any such society, provided that the receipt is executed in the manner required by the statute relating to the society.

As to the statutory form of receipts scheduled to the Friendly Societies Acts being permissive only, see *Carlisle Banking Co.* v. *Thompson*, 28 Ch. D. 398.

The condition requires the purchaser only to "assume" and not "conclusively assume". In *Re Duce*, [1937] 3 All E. R. 788, a statutory provision stating that an assent should be "sufficient

evidence " that the person taking the benefit under it was entitled to have the legal estate conveyed to him was interpreted by Bennett, J., as meaning only that the purchaser could rely on the validity of the assent unless upon a proper investigation of title facts come to his knowledge which indicate the contrary. It does not follow that a condition requiring a purchaser to assume on certain evidence, or without evidence, that a certain state of facts exists or that a given document is valid has the same effect as a provision that a given document shall be evidence of a certain matter of fact or of law. This would, however, appear to be the result of the case law. In *Harnett* v. *Barker* (1875), 20 Eq. 50, it was held that a condition requiring the purchaser to assume that A was seised in fee simple of certain property did not prevent the purchaser from objecting to the title on the ground that he was, in fact, not so seised, being only a contracting purchaser at the material date. Similarly, it has been laid down that a condition requiring a purchaser to assume that which the vendor knows to be untrue is ineffective: *Re Banister* (1879), 12 Ch. D. 131. If the vendor does not misstate the facts or if the vendor honestly believes the facts to be as stated, then even if the condition covers a matter which goes to the root of the title it will still be effective: *Re Sandbach & Edmondson*, [1891] 1 Ch. 99; *Blaiberg* v. *Keeves*, [1906] 2 Ch. 175.

See *Beyfus* v. *Lodge*, *supra*, p. 147, as to the superior strength of a provision that a document is " conclusive evidence ".

NOTES OF RECENT CASES.

1. *CONVEYANCING AND PROPERTY CASES.*

Charities—nature of—" parochial work "—" public hall ".—The application of the definition of a charitable trust to any particular gift is increasingly difficult in view of the large number of decisions coupled with the great variety of objects sought to be benefited. It is possible to do little more in most cases than to catalogue the decisions, since the general principles are reasonably ascertained.

In *Re Ashton's Estate* (1937), 106 L. J. Ch. 234, a testatrix gave part of her residuary estate to the vicar and churchwardens of a particular parish " for parish work ". Luxmoore, J., held that this was a good charitable bequest because parochial work included purposes other than the advancement of religion. The learned Judge in arriving at this decision distinguished two cases. First, in *Att.-Gen.* v. *Lonsdale* (1827), 1 Sim. 105, a gift for some purpose conducing to the good of the county of Westmorland and the parish of Lowther especially was held a good charitable bequest. This was valid because it was for the benefit of persons generally in the specified districts. " Parish work " in the view of the learned Judge was for the benefit only of a section of the inhabitants of the parish. Secondly, in *Re Bain*, [1930] 1 Ch. 224, the residue was left to a vicar " for such objects connected with the church as he should think fit ". Here also the Court of Appeal held that there was a valid charitable bequest, but the Master of the Rolls (Lord Hanworth) pointed out that those words should be interpreted as relating to the church in contradistinction to the parish, and it was not disputed that there would be a charitable trust if it were confined to the support of the church, its fabric and its services. In the light of these decisions some difficulty may arise. It has become the modern practice for churches to indulge in rather extensive activities, all designed to the ultimate aim of extending religion, which are not directly connected with the church and its fabric or its services. The layman at least would say that such purposes are for the " advancement of religion " within the well-known classification in *Pemsel's Case*, [1891] A. C. 531, but it remains uncertain whether the same view would be adopted by the Courts. As a practical solution it is suggested that draftsmen

of wills of testators desiring to give the widest possible discretion to the church authorities (obviously the intention in the cases referred to) might employ some such phrase as "for such purposes in connection with parish work as may be for the advancement of religion". It is thought that in such a case no question could be raised that it is not a charitable trust, though until the limit of the purposes of advancement of religion is finally settled, if indeed it ever is, it may be necessary in some cases to apply for directions to the Charity Commissioners or the Court before the money is employed in a contemplated object.

In this connection reference should be made to *Re Stratton*, [1931] 1 Ch. 197, applied in the case noted, where the Court of Appeal held that a gift "for parochial institutions or purposes" was not charitable, and Lord Hanworth referred to certain activities in such a way as to imply that though estimable they were not charitable.

In *Re Spence's Estate* (1937), 53 T. L. R. 961, the testator gave the residue of his estate for the purpose of purchasing land and erecting a public hall by the corporation of Stockton-on-Tees for such public purposes as it might deem advisable. He also gave a collection of antiques to be housed in the hall.

The gift of the antiques did not present much difficulty but the question was raised whether the gift for the erection of the public hall was a valid charitable bequest. The whole problem really turned upon the user to which the property was to be put, since "public purposes" are not necessarily charitable and, therefore, a gift for public purposes is not a charitable bequest: *Blair* v. *Duncan*, [1902] A. C. 37; *Houston* v. *Burns*, [1918] A. C. 337. In the case noted, it was held that the bequest was a good charitable bequest. The decision largely turned upon the application of the principle discussed in *Houston* v. *Burns* (*supra*) concerning the effect of localisation of the area in which the object is to benefit: cf. *Re Gwyon*, [1930] 1 Ch. 255. Here it was quite clear that the intention was that a public hall should be built for the purposes of the inhabitants generally of the area represented by the corporation, which was to be trustee. It was this factor which appears to have saved the gift from failing as a charitable gift on the ground that public purposes may include non-charitable objects.

With the case just noted it may be convenient to contrast *Re Turkington*, [1937] 4 All E. R. 501, where the testator left his residue to a masonic lodge with a superadded direction that it was for the purpose of building a suitable masonic temple. Luxmoore, J., held that it was a valid bequest, whether or not it

was charitable, because it was to the lodge, which must mean the members for the time being as there was no separate trustee, and that consequently the direction did not prevent them, if it was not a charitable trust, from dealing with the fund in the ordinary way in which their constitution permitted them to deal with their property : citing Byrne, J., in *Re Clarke*, [1901] 2 Ch. 110. It is to be noted that this decision depended upon the identity of the trustees and beneficiaries (on the assumption that there was no charitable trust). A man cannot be sole trustee for himself, for in such case no trust is created.

Advancement clause—settlement by way of advancement.—In *Re Halsted's Will Trusts*, [1937] 2 All E. R. 570, the Court was asked to sanction an advancement by way of settlement on the beneficiary's wife and child. Under the will the beneficiary was entitled to a life interest and after his death his share was to fall into residue. The trustees were, however, entitled to advance a moiety of his share " for the purpose of establishing him in business or otherwise for his benefit and advancement in life ". The beneficiary was, at the date of application, sixty-three years old, and there was no question of making an advancement to set him up in business, but, as he was unable to make provision for his wife and child, he was anxious for an advancement by way of settlement. Farwell, J., held that in the circumstances he could read " benefit and advancement " disjunctively, and that it was for the benefit of the beneficiary to relieve his anxiety by making a settlement, but the only persons who could be included would be the wife and child and any ultimate trust would be in favour of the testator's residuary estate. The learned Judge only held that the trustees had power in their discretion to make the advancement, not that they must.

It is to be observed that the statutory power of advancement under the Trustee Act, 1925, s. 32, is for the " advancement or benefit " of the beneficiary, and that, therefore, the section is if anything wider than the clause in the will in the case noted.

Portions—definition of eldest son.—Re Leeke's Settlement Trusts (1937), 106 L. J. Ch. 228, fills in a gap in the present line of decisions relating to the definition of " eldest son " for the purpose of exclusion from the right to portions. The charge of portions

was for the benefit of children "other than a first or only son entitled or daughter indefeasibly entitled . . . to the said premises for the first estate in tail male or in tail respectively". The claim in the case was made by the personal representative of the deceased eldest son, who had died after attaining his majority but before obtaining an interest vested in possession to the estate. On attaining his majority the deceased eldest son had, subject to the prior limitations and with the consent of the protector, barred the entail and resettled to such uses as he and the protector should appoint and in default of appointment to the uses and trusts on which they were held immediately prior to the disentailing assurance. The power was exercised only once, which was for the purpose of creating a mortgage for £29,000, of which sum only some £50 odd was paid to the eldest son. In these circumstances it was argued that the eldest son had never become entitled to the premises and his personal representative was entitled to share in the portions. Simonds, J., held that by making a disposition of his interest, although it was held only in remainder, the eldest son had disentitled himself to any portion. It was irrelevant that in fact he had benefited hardly at all by his disposition.

The leading authority is *Collingwood* v. *Stanhope* (1869), L. R. 4 H. L. 43, where it is laid down that an eldest son, although he may have attained a vested interest in remainder in the settled property, will not be excluded from the enjoyment of a portion if he has not in fact succeeded to the estate itself, as, for example, by dying in the lifetime of the tenant for life. The basis of this decision is that there is an intention to provide equally for all children and clearly an eldest son, who does not succeed and who does not get a portion, is omitted in favour of others. On the other hand, if the eldest son in fact disposes of his interest in remainder by way of disentailing assurance he may be said to have succeeded to his estate within the intention of the excluding clause. In so holding, Simonds, J., was adopting a principle consistent, as he said, with the Irish case of *Rooke* v. *Plunkett*, [1902] 1 Ir. R. 299, where the eldest son entitled in remainder had barred the entail to concur in mortgages by the tenant for life, but there was no evidence of the amount of the mortgage money, if any, which went into his pocket. In *Re Fitzgerald's S. E.*, [1891] 3 Ch. 394, the eldest son in remainder had barred the entail for the purpose of resettlement, but he had obtained equal to or greater than his portion would have been and hence he was held not to be entitled to a portion. It will be seen that the decision of Simonds, J., goes further than any existing English case, but the principle seems to be that where an eldest son, entitled

in remainder, by any act interferes with his estate *in futuro* in such a way as to exercise control his estate will not be entitled to a portion in the event of his death prior to the remainder falling into possession. The authorities are collected and discussed in *Norton on Deeds*, pp. 476—489.

Perpetuity—contingency of life interests.—Re Legh's Resettlement Trusts (1937), 53 T. L. R. 1036, may settle a doubtful point concerning the nature of interests in survivorship for life after the determination of prior interests in common. By a will in exercise of a special power of appointment conferred by a deed of 1891 a testator appointed a sixth part of settled funds to two grandchildren in equal shares during their joint lives and after the death of one of the grandchildren the survivor should take the whole interest during his life. The grandchildren were not lives in being at the date of the settlement and the question was whether gift to the survivor failed for perpetuity on the ground that it was a contingent interest capable of vesting more than twenty-one years after the death of any life in being for the purposes of the settlement. It was held by the Court of Appeal that it was a contingent interest and failed for perpetuity.

The joint life interest in undivided shares vested on the death of the testator, a life in being for the purposes of the settlement, and therefore was valid under the rules governing the application of the perpetuity rule to special powers of appointment. The vesting of the remainder over in favour of the survivor, however, could not be ascertained until the death of one or other grandchildren, which was an uncertain event at a period too remote. The fact that which of the grandchildren would survive was uncertain rendered the interest contingent and it could only vest at an unascertained period after the death of any life in being for the purpose of the perpetuity rule. The Court of Appeal approved a similar decision of Buckley, J., in *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783, and disapproved the decision in *Gooch* v. *Gooch* (1853), 3 De G. M. & G. 366, and a *dictum* of Eve, J., in *Re Samuda's Settlement Trusts*, [1924] 1 Ch. 61. Had the interest granted to the survivor been a fee simple it was certainly contingent and would have failed for remoteness, but as a life interest it bears a striking resemblance to a life interest in favour of A followed by a life interest to B, since B can only take an interest in possession if he survives A. The analogy is false, because B has an immediate vested interest and there is no doubt of his

interest, whereas the survivor of A and B is an unascertained person. As a result where the object of this limitation is to be obtained, and the intention is common enough, another device must be employed. One obvious method is that mentioned by Greene, M.R., of giving a life interest in a moiety together with a life interest in the other moiety on the death of the other life tenant. It is one of those illustrations of purely technical rules in drafting that cannot be altogether avoided in the law though they are patently absurd to the layman. It might also be convenient to point out that the adoption of the method suggested by the learned Master of the Rolls would have another effect dependent also on conveyancing. By giving each a moiety with a remainder to the other would of course mean that the whole would take effect as limitations in undivided shares, whereas the other limitation, which is invalid, might be by way of joint tenancy during their joint lives. By the first of these alternatives a trust for sale must subsist *ab initio* (see S. L. Act, s. 36), whereas joint tenancy can subsist under a settlement under the Settled Land Act. A curious illustration of the unforeseen effect of the Property Legislation of 1925.

On the other hand, there does not seem to be a good reason why the freehold during the lives of A and B and the life of the survivor should not be limited to A and B as joint tenants, which would have the same effect as the limitation, since by the *jus accrescendi* the interest must be vested in the survivor for the remainder of the estate limited. Unfortunately this limitation has that look of novelty, which would not recommend it to a conveyancer.

Separation deed—covenant to pay allowance during the wife's life.—In *Kirk* v. *Eustace*, [1937] A. C. 491; 106 L. J. K. B. 617, the House of Lords overruled the majority of the Court of Appeal by holding that a simple covenant by a husband in a separation deed to pay to his wife an allowance during chastity for her life without reference to his executors and administrators was binding on his estate after his death. In support of this view section 80 (1) of the Law of Property Act, 1925, was cited, which renders a covenant binding on both real and personal estate unless the contrary is expressed in the instrument. It should be added that these covenants depend upon their exacting wording for their construction, but it would appear that where there is a covenant to pay during the covenantee's life without more in a separation deed the death of the husband will not put an end to the liability

on his estate. Therefore, where this is intended it can only be achieved safely by the insertion of an express clause limiting the liability to the life of the husband, or by employing a clause which makes provision for the continuance of the annuity after his death in certain events: See *The Conveyancer*, vol. 20, p. 34 (for precedent).

Trust—specific enforcement to create a trust although innocent breach of trust.—In *Briggs* v. *Parsloe*, [1937] 3 All E. R. 831, the facts were somewhat peculiar. X, who was tenant for life, under a settlement created by will, requested to be made a trustee. One purpose behind this request was to avoid the sale of certain securities or the provision of a sinking fund to meet depreciation which was in the minds of the existing trustees. In the course of negotiations X agreed that if he was appointed a new trustee he would make a settlement on some of the beneficiaries entitled in remainder. This was accepted in principle, and before his appointment he wrote a letter saying that the settlement was prepared but was waiting his appointment. This was untrue, but the trustees accepted it and he was appointed trustee. On his death an action was brought by his surviving co-trustee to enforce the agreement against X's personal representatives. Farwell, J., held that (i) the action could properly be brought by the surviving trustee; that (ii) consideration was given by the beneficiaries since they could have opposed the appointment of X as new trustee; that (iii) although the appointment of the tenant for life was not readily made by the Court and might have been refused in the particular case, yet even if it was a breach of trust on the part of the existing trustees it was still specifically enforceable as the obligation on the part of X was to take place after the innocent breach of trust, and that (iv) in any case the action could have been framed against the personal representatives for a declaration of trust of the amount promised to be settled on the ground of the misrepresentation.

The interest of this case is primarily one of its practical application. It is thought that, as the learned Judge pointed out, there is no new principle really involved. It would seem that the action would have been better framed as an application for a declaration of trust. The learned Judge directed that further proceedings forming different parties should be instituted to settle the exact nature of the trust, which could presumably have been accomplished in one proceeding had a different course been pursued. At the same time a declaration of trust would have

depended upon the doctrine of estoppel based upon a misrepresentation, never a wholly satisfactory form of litigation. In so far as specific performance can be granted for a contract made in consideration of an innocent breach of trust it seems a little difficult to know whether this applies to all cases of innocent breach of trust or whether it has limits.

Compulsory acquisition—compensation for injurious affection—water in an undefined channel.—Re Sir John Simeon and the Isle of Wight Rural District Council, [1937] 1 Ch. 525, is of interest not only as an illustration of the principles of compensation for injurious affection in compulsory acquisition under the Lands Clauses Consolidation Act, 1845, but also in the limits it puts upon the well-known principle that there can be no right to water percolating underground in an undefined channel.

Since the decision in *Bradford* v. *Pickles*, [1895] A. C. 587, there has been no doubt that a reservation of underground water not flowing in a defined channel would be invalid as a reservation of an easement. It has been fairly generally assumed, it is believed, that such a reservation would be valueless save as a contractual obligation which would not in any sense be binding upon a successor in title to the land. The careful analysis of the position made by Luxmoore, J., in the case noted (see pp. 536—539), throws much light on the limits to be put upon this proposition.

The predecessor in title of the claimant had, by an agreement made in 1902, granted the council for the term of 999 years the right to enter upon a piece of land forming part of his estate for the purpose of searching for and taking water from such land, to make a reservoir on another part, and to lay a pipe line with ancillary powers. For this privilege the Council were to pay £500, to provide a free water supply to the farm named, not to extend their mains or water supply outside certain boundaries, and not to levy water rates beyond a certain scale without the consent of the claimant. To this agreement there were three supplemental agreements concerned with subsidiary matters. In 1932 the claimant conveyed the land, the subject of the original agreement, apart from the site of the well and pumping station, to a purchaser in fee simple. The conveyance was subject to certain reservations and to a covenant, which it was agreed at the hearing was, if enforceable at all, so framed as to run with the land for the benefit of the grantor's estate. The reservations were, first, all water (whether surface or underground) in or under any of the property thereby conveyed and all necessary easements, rights of way,

privileges, powers and liberties necessary for the full enjoyment of the reservation. The reservation also included all rents, moneys and other payments which might be receivable in respect of the first reservation. The covenant was that the grantee should do nothing whereby the water supply should be diminished or its purity impaired subject to certain rights of user for agricultural and domestic purposes.

The council, having acquired part of the farm by compulsory purchase, for the purpose of water supply, refused to accede to a claim for injurious affection. The council's refusal was supported upon two grounds, the first of which was that the reservation had no binding force upon the grantee under the conveyance of 1932 because it conferred no legal right or interest in the land conveyed. It was argued, and the learned Judge accepted this, that water is not the subject of property, but he said (at p. 537): "There is, however, nothing to prevent the owner of land giving another the right to enter upon his land in order to obtain a supply of water from it, and for that purpose to dig wells, make reservoirs and lay pipes, or execute any other specified works. . . ." (At p. 538): "If the grant of the easements and rights had stood alone and the attempted reservation of the water had been omitted, there could be no doubt but that the easements and rights would have been valid and would, in the events that have happened, confer an interest in land on the claimant." The learned Judge, then, also held that the covenant was equally binding, on the ground that it should be construed as imposing a contractual prohibition on the covenantor and those deriving title under him from doing anything to interfere with the existing and future water supply at the existing works. Consequently, the learned Judge held that the claimant had an interest in the land subject to the compulsory notice.

It may be observed that the learned Judge was not concerned to ascertain precisely the effect of the interests which he held to exist. He clearly laid down that a reservation of all water, surface or underground, would not be effective to confer any rights, but apparently the easements and other rights would be of little effect without effective use of the water. The combination of the covenant, which would have the effect of preventing the servient owner from using the water, and the valid reservations would largely operate to confer a right to water. It would not do so completely, of course, save as against the servient owner of the land.

The second objection to the claim was purely technical upon the Lands Clauses Act. It was argued that the injurious affection

would not arise from the construction of the council's works but only from their user : *Hammersmith and City Ry.* v. *Brand*, L. R. 4 H. L. 171. The learned Judge, however, distinguished this case on the ground that the statute authorised not only the construction of the works but also their maintenance, following *Fletcher* v. *Birkenhead Corporation*, [1907] 1 K. B. 205. In order to supply the water it was necessary to draw the water off the land and this was an execution of the authorised works.

Tenant for life—trustees—preservation of trust property—right to recoupment.—That there is a duty on trustees to preserve the trust property so far as the resources of the trust will permit is axiomatic. This duty is obviously complementary to their right to recoup themselves for all expenses properly undertaken. Where, therefore, they have no right to recoup they have no duty to preserve, but the exact limits of this right remain somewhat ill-defined as may be illustrated from two cases this quarter, one of which affects the relation of capital and income but the other governs the right to recover at all.

In *Re Warwick's Settlement Trusts*, [1937] 1 Ch. 561, a tenant for life held his life interest in strict settlement subject to a jointure and interest on a portions charge. The tenant for life assigned his life interest. During his lifetime it was found that the income from the settled estate was insufficient to meet the jointure and the interest on portions. In order to preserve the capital fund the assignees of the life interest made up the deficiency and claimed to have a charge to recoup themselves out of the capital upon the principle enunciated in *Kensington* v. *Bouverie*, 7 H. L. C. 557. Farwell, J., refused to grant the application during the continuance of the interest of the life tenant. He distinguished the case of *Kensington* v. *Bouverie* (*supra*) because there the House of Lords was concerned only with the claim of a tenant for life or his personal representative to recoupment of interest so paid after the determination of the interest of the life tenant. He pointed out that the claim could only be justified if there had been actual payment out of his own moneys and that the sums which he has paid out were more than the sums which he ought to have received *had the estate been properly managed*. Further, the tenant for life or his personal representative must show that there is nothing inequitable in the particular facts of the case in setting up the claim, and in *Kensington* v. *Bouverie* (*supra*) the majority held that the equity could not be asserted where the tenant for life

had made the payments without communication or notice to the remainderman. Consequently, the learned Judge held that during his interest the life tenant could only make such payments, if it suited him, at his own risk. When the tenancy for life came to an end, or, *perhaps*, when the estates were sold and the proceeds invested, the position was different. In such circumstances the question of recoupment might be considered.

The judgment is important not only on this point, which certainly makes clear the danger of payment out of his own moneys of capital charges, but also for the general statement by which the learned Judge preceded his examination of the particular case. He said (at pp. 568, 569) : " It is well settled that, where a tenant for life pays off a capital charge on the estates out of his own moneys, he is entitled *prima facie* to keep the charge alive for his own protection, but I have found no case which in terms explains the principle upon which that rule rests. Generally speaking, where a person out of his own moneys voluntarily chooses to pay off a charge on the property of another without taking an assignment of the charge, the charge goes, and the person making the payment has no claim against the estate or against the owner of the estate. What is sometimes called the right of subrogation is a right which is extremely limited in its application. There are rights of subrogation at common law in respect of insurance. There are rights in equity of subrogation in case of sureties and in some cases of trustees, and there may be other cases; but the right is a limited one, and it may be useful to consider how the right of recoupment in a tenant, who pays off a capital charge, arose. In my judgment it is clearly an equitable and not a legal right, and I think that it originated in a Court of equity, when administering an estate, coming to the conclusion that as both the tenant for life and the person entitled in remainder had some interest in the estate as a whole, if the tenant for life paid off a charge on the whole estate out of his own moneys, it was inequitable to permit the remainderman to have the benefit of such a payment, and in order to do equity between the parties the Court held that the tenant for life in those circumstances was *prima facie* entitled to stand in the shoes of the mortgagees or chargees. In such a case the onus rests on those who say that by such payment the tenant for life did not intend to keep the charge alive, and in the absence of any satisfactory evidence to the contrary, the tenant for life is entitled to be recouped. Whether such an equitable right exists in a tenant for life to recover interest paid out of his own moneys on such a charge is a question which, so far as I know, has never been exactly decided, but, having regard to the case to which I

have already referred, *Kensington* v. *Bouverie* (*supra*), it is difficult to say that there can never be any such equity in his favour because, although the learned law lords differed as to whether or not in the particular circumstances of that case the equity could be successfully asserted by the legal personal representatives of the tenant for life, they all appear to have recognised that there might be such an equity, and that in certain circumstances a claim for recoupment could be successfully asserted."

It is to be noted that the learned Judge seems to have treated the position of the assignees of the life interest as in an equivalent position to that of the life tenant. Furthermore, the assignment of the life interest took place in 1932, and, though the assignees had gone into possession of the rents and profits, the legal estate in the settled land must clearly have been vested in the life tenant or some third party as estate owner : Settled Land Act, 1925, s. 104; cf. *Re Carnarvon's S. E.*, [1927] 1 Ch. 138. On the other hand, a life tenant, since 1925, is in the position of an express trustee of the whole fee simple by virtue of section 16 of the Settled Land Act, 1925. Whether this should confer upon him a wider discretion in making payments out of his own moneys to preserve the capital estate intact than formerly when the legal estate was split up between himself and the remainderman was not called upon for consideration. These factors leave the law in a very unsettled state. It has been pointed out before by the writer of this note, both in the columns of this periodical and elsewhere, that the general assumption that changes made in conveyancing machinery have not altered substantive rules of law has in a number of decisions on the 1925 legislation been shown to be unfounded. Perhaps the classic example of this modification of the law is that concerned with the statutory trust for sale arising in the case of concurrent interests in land, which has much affected the position of the beneficial owner in a number of respects. The position created by the dual capacity of a life tenant in possession under the Settled Land Act as estate owner and trustee of the fee simple and as beneficial owner of an equitable interest under the settlement has not received the same attention in the Courts. In *Re Liberty's Will Trusts*, [1937] Ch. 176 (noted *ante*, vol. 1, p. 268), the distinction between acts done in these two capacities was clearly drawn. It would, therefore, appear that this aspect of the matter will be elaborated in future decisions and practitioners must be directed to possibilities, not perhaps foreseen at the time of the legislation. It is felt that the absence of a larger number of authorities is due rather to the absence of litigation than to the freedom from complication of the subject-matter.

The other case on recoupment, *Re Smith's Estate*, [1937] Ch. 636, related to the payment of premiums on a policy taken out by a husband payable at ten years or his earlier death expressed to be payable to the proposer or his personal representatives for the benefit of his wife. The wife died less than two years after the date of the policy and it having no surrender value was not included in the Inland Revenue affidavit. The husband continued to pay the premiums until maturity, and subsequently died. The personal representative of the husband claimed to recoup his estate in respect of the premiums so paid.

Luxmoore, J., held that since *Cousins* v. *Sun Life Assurance Co.*, [1933] Ch. 126, there was no doubt that the policy was held by the husband in trust for the wife's estate. He, then, held that the husband was entitled to be recouped his expenditure under the second rule stated by Fry, L.J., in *Re Leslie*, 23 Ch. D. 552, at p. 560, concerning lien for premiums on a policy, namely, " by reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation ". The learned Judge said that it was true that during their joint lives the relationship was also that of husband and wife, but after the wife's death that relationship ceased and he could see no answer to the claim for recoupment.

It will be observed that in neither of these cases was the duty to preserve the trust property in issue. It is submitted that if the trustee is properly bound to maintain the trust property he must, provided that he takes only reasonable and proper steps, be entitled to recover from the trust fund moneys properly expended for the purpose. This, however, does not determine the source from which such moneys must be drawn, whether it be capital or income. This is a further problem illustrated by the first of the cases noted. What, however, is still more difficult is the question of the relationship between the *right* to preserve trust property and recoup and the *duty* to preserve trust property with liability for failure to do so. A note is hardly the place to examine this problem, but practitioners may do well to consider it in connection with the administration of trust funds.

Mortgage of equitable interests in realty and personalty—statutes of limitation—agents for the purpose of acknowledgment. —In *Re Edwards*, [1937] 1 Ch. 553 there is a reminder that no statute of limitations applies to a mortgage of equitable interests in pure personalty (*Weld* v. *Petre*, [1929] 1 Ch. 33), though an interest in the proceeds of sale of land is land for the purposes of

the Real Property Limitation Acts: *Re Witham*, [1922] 2 Ch. 413, which, of course, also includes leasehold. In this case, the debtor had in 1895 made a mortgage of all his undivided third share in certain freehold and leasehold properties under the will of his great-grandfather. In 1896 he had made a further mortgage of all his interest under the will of his great-grandfather and under any other will whereby he might benefit. In 1897 he was adjudicated bankrupt. Neither the bankrupt nor his trustee had ever paid interest or given acknowledgment. The trustees of the will, having had notice of the two mortgages, by their solicitors in 1935 sent a copy of the distribution account under the will of his great-grandfather to the personal representative of the mortgagee, then deceased. In 1935 the share of the bankrupt mortgagor was represented by a sum of money on deposit at the bank. The principal argument for the mortgagee was that the distribution account was an acknowledgment on behalf of the debtor by the trustees as his agents. Farwell, J., held that this contention was not well founded. He distinguished *Bradshaw* v. *Widdrington*, [1902] 2 Ch. 430 on the ground that there the solicitor was the agent of the debtor as he was as between himself and the mortgagor bound to pay the money to the mortgagee, whereas in this case the trustees, having notice of the mortgage, " were under a duty to see that payment was made to the persons entitled and they might have run some risk if they had paid over the money to the mortgagor disregarding the mortgagees, but that does not mean that as between the mortgagor and themselves the trustees were bound to pay the mortgagees " : at p. 559.

The learned Judge, therefore, held that the first mortgage was barred by limitation inasmuch as it was a mortgage of land. The fact that it was an undivided share was not commented upon, presumably because the title by limitation would have accrued prior to 1925, but in any event that was immaterial, since a trust for sale remains land for this purpose.

With regard to the other mortgage the learned Judge directed an inquiry " of what the property included in that mortgage consisted at the date of the mortgage and what now represents the personal property and the land respectively then included in the mortgage ".

Contract for sale of house—house in course of erection—implied warranty.—The law concerning warranty in the case of houses is peculiarly strict against the purchaser. A house, which has been completed, is sold without any implied warranty concerning its

fitness for occupation : see *Bottomley* v. *Bannister*, [1932] 1 K. B. 458, and cf. *Otto* v. *Bolton*, [1936] 2 K. B. 46. *Perry* v. *Sharon Development Co.*, [1937] 4 All E. R. 390, states a modification of the principle where the house is not actually completed at the time of sale. Sir Wilfrid Greene, M.R., adopted generally the view of Swift, J., in *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K. B. 113, that the position is quite different when a contract is made with a builder or the owners of a building estate in course of development for the purchase of a house in course of erection, though he expressed some doubt (which it was not necessary to resolve) whether some of the reasoning in that judgment commended itself to him. The learned Master of the Rolls stated the principle to be applied as follows (at p. 393) : " Where the contract is a contract relating to a house which is still in the process of being completed, where the vendor's workmen are still on the job, and particularly where the completion is not to take place until the house has arrived at the contemplated condition—namely, complete finish and readiness for occupation—there must be implied in that contract an undertaking that the house shall be in that condition."

It is to be noted that this case deals with the question of implied warranty where the contract is entered before and during the course of erection of the house and completion is to take place when the house is completed. In fact, in this instance the plaintiff did ultimately go into possession and some months thereafter began to complain of the condition of the house.

There is also the problem of what will constitute course of erection to take the house out of the rule *caveat emptor*. This must be a question of fact. In the case noted the facts as found by the county court judge and accepted by the Court of Appeal were as follows : " [The house] had been partly constructed. The defendants maintained that it was completely constructed all but the decorations. I found that in addition to the decorations the house lacked such things as water taps, baths, grates, electric meter, seat to the water closet, moreover the plastering of the walls of the dining-room and drawing-room was not complete." It will, therefore, appear that the course of erection may have proceeded a considerable distance and yet this principle of implied warranty will apply. Apart from express contract the warranty will be apparently that the house is " fit for human habitation ", since these are the precise words used by two of the learned Judges.

It may be added that the result of this authoritative decision of the Court of Appeal is to put the purchasers of houses on building estates in a far stronger position where they enter into a contract before the erection of the proposed house is completed.

2. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Tenancy by mortgagor under attornment clause—determination of tenancy by issue of proceedings claiming possession.—In *Woolwich Equitable Building Society* v. *Preston*, [1937] W. N. 377; 54 T. L. R. 80; 81 S. J. 943, a point arose as to the determination of a tenancy by attornment under a mortgage deed. Under a clause in the deed the mortgagor attorned and became tenant from year to year of the mortgagee of such parts of the mortgaged property as should be in the occupation of the mortgagor, at the yearly rent of sixpence if demanded. There was an express provision enabling the mortgagee at any time after the power of sale conferred by the mortgage became exercisable, and without any notice to quit being given, to enter and take possession and determine the tenancy created by the attornment.

Instalments of repayments to the mortgagee being in arrear, the mortgagee commenced proceedings claiming possession. It was suggested that as there had not been any actual entry or taking possession, the tenancy from year to year was still in existence and notice to quit was required to determine it.

It is clear, however, that in law the bringing of proceedings claiming possession is equivalent to entry. One result of this principle is seen in the rule that the bringing of an action to recover possession of demised premises for a forfeiture under a clause of re-entry operates as a final election by the lessor to determine the term (see *Jones* v. *Carter* (1846), 15 M. & W. 718). The principle upon which the rule is founded was stated by Willes, J., in *Grimwood* v. *Moss* (1872), L. R. 7 C. P. 360; 41 L. J. C. P. 239, to be "that the bringing of the action of ejectment is equivalent to the ancient entry". Some doubt was expressed by Bowen, L.J., in *Ex p. Dyke* (1882), 22 Ch. D. 410, at p. 428, as to whether the same principle still applies under the modern procedure, but the point did not fall to be decided in that case, and in *Sergeant* v. *Nash, Field & Co.*, [1903] 2 K. B. 304; 72 L. J. K. B. 630, the Court of Appeal held that the bringing of an action to recover possession has the same effect as the old action of ejectment.

While, therefore, it is perfectly correct to say that under the attornment clause the tenancy from year to year continues until entry by the mortgagee (see *Re Threlfall* (1880), 16 Ch. D. 274), nevertheless the bringing of an action by the mortgagee claiming possession is equivalent to entry by him and has the same effect of determining the tenancy. This is illustrated by the case of

Moore v. *Ullcoats Mining Co., Ltd.*, [1908] 1 Ch. 575; 77 L. J. Ch. 282, where, however, owing to the nature of other claims joined in the same writ it was held that the writ was not an unequivocal demand for possession. It was accordingly held by Clauson, J., in *Woolwich Equitable Building Society* v. *Preston* that the moment the claim for possession was issued the mortgagee was deemed to have entered; the tenancy from year to year being thereby determined, no notice to quit was necessary.

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3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Administration—payments to legatees on account—appropriation of payments as between principal and interest.—When personal representatives postpone payment of a pecuniary legacy, *e.g.*, because they have not as yet sufficient funds for the purpose, the legacy will ordinarily carry simple interest at 4 per cent. as from the end of the executor's year (or, in certain circumstances, from the date of the testator's death). Hence, if the personal representatives make payments on account, the question may arise whether such payments should be regarded primarily as a satisfaction (*pro tanto*) of the capital of the legacy or whether they operate primarily in reduction of arrears of interest. The latter alternative is usually the more advantageous to the pecuniary legatee; the former to the residuary legatee.

If an executor, making such payments on account, does not profess to appropriate them to either principal or arrears of interest, the legatee may make an appropriation in the latter direction. This was decided, on analogy to the rules as between creditor and debtor, by Clauson, J., in *Re Prince, Hardman* v. *Willis*, [1935] W. N. 123. But he carefully refrained from deciding whether the executor could have made an express appropriation when making the payments on account. *Re Morley's Estate, Hollenden* v. *Morley*, [1937] Ch. 491, appears to carry the matter a stage further. Simonds, J., there held that, in the absence of any order of the Court or direction in the will to the contrary, the general rule of administration "established beyond question by authority . . . is that where a payment is made on account of principal and interest of a legacy, it is to be ascribed first to interest and next to principal" (at p. 496). He stated further (at p. 497) that had the trustees of the will purported to appropriate by virtue of a common form power contained in the will (to determine whether payments were of capital or of income) he would have had seriously to consider whether they could do so.

The payments in question had in fact been made pursuant to an order of the Court. This order prescribed that such payments " be made generally on account of such legacies and any interest due thereon ". Possibly, therefore, the trustees were precluded thereby from making (as counsel, at p. 493, states they purported to do) an express appropriation to capital. But the judgment, as reported, does not refer to this point, and appears to hold that this order was irrelevant in that it contained nothing inconsistent with the general rule stated above. The legacies being settled legacies, other orders of the Court had been made as to the rights of tenant for life and reversioner *inter se* in respect of these payments. But these orders were held to be immaterial, since the present question arose only as between the pecuniary and the residuary legatees.

Settlement upon trust to pay legacies bequeathed by settlor's will—settlement held irrevocable—will revoked—lapse by analogy. —The facts of *Re Hall's Settlement Trusts, Samuel* v. *Lamont*, [1937] Ch. 227, were somewhat unusual. In September, 1904, H. made a will by which pecuniary legacies were bequeathed to J. L. and F. L. respectively. Two months later, he settled a fund upon trust for himself for life and, after his death, for the payment of the legacies bequeathed by his will. In 1914 he became bankrupt; and in 1918, following an application to the Court by his trustee in bankruptcy, Sargant, J., declared that the trusts of the settlement to take effect after the settlor's death were absolute and irrevocable, whether or not the settlor revoked his will. The settlor in fact revoked his will. He died in 1936, the legatees, J. L. and F. L., having predeceased him. Their personal representatives thereupon claimed the amount of their legacies from the trust fund. Clauson, J., however, held that the trust was a trust to pay such legacies as would have been payable had the will not been revoked; that the trusts were therefore subject to a corresponding liability to lapse; and that legatees who died before the testator were thus excluded from any benefit under the settlement.

In contradistinction to the above decision, it may be noted that the constructive trust which may arise when two persons make mutual wills was held by the same learned Judge (*Re Hagger, Freeman* v. *Arscott*, [1930] 2 Ch. 190) to be unaffected by the death of a legatee during the lifetime of the surviving testator.

Will—construction—" all my possessions "—" equally amongst all my relations "—A. E. Act, 1925, *s.* 46 (1).—*Re Bridgen, Chaytor*

v. *Edwin*, [1937] W. N. 378; [1937] 4 All E. R. 342, concerned a short will, dated February 8, 1930, in the following terms: "In case of my immediate decease I wish E. and H. to take possession of all my possessions to be held in trust after my death and divided equally amongst all my relations". The testatrix died, a spinster, on February 12, 1930. E. and H. renounced administration.

As to the phrase "all my possessions", Clauson, J., held that it amounted to a universal gift of all that the testatrix could bequeath or devise by will. It therefore passed all her property, and there was no intestacy.

As to the phrase "all my relations", the primary meaning of the word "relations" is so wide that to give it its full effect would usually render such a gift void for uncertainty. The Courts have therefore, in the past, construed a devise or bequest to "relations" in a more limited sense, so as to include only those relations (not a mere spouse) who would take on intestacy under the Statutes of Distribution. See Hawkins on Wills (3rd ed.), p. 135. In the present case two new questions arose. (1) Did the phrase "*all* my relations" exclude this beneficial restricted interpretation? Clauson, J., held that it did not. (2) Since the Administration of Estates Act, 1925, which altered the rules of devolution on intestacy, will the Court modify the above "rule of convenience" so as to read "relations" as now meaning those entitled on intestacy under the new Act? Clauson, J., held that it will. Accordingly, "relations", in the will of a testator who dies after 1925, ordinarily means those relations entitled on intestacy under the new law.

It may be noted that the learned Judge rejected counsel's suggestion that it was open to him, since this opportunity of reviewing the former rule had arisen, to extend the meaning of "relations" so as to cover all relations within section 46 of the Act—whether actually or potentially able to take on intestacy. Consequently, only those who, on the facts, would actually take on intestacy can benefit, and remoter relations (who, though possible participants under the Act, are in fact excluded because nearer relations exist) are still excluded. Applying this rule to the facts before him, the learned Judge pronounced in favour of certain issue of the deceased sisters of testatrix; and, in view of the words "equally amongst", they took in equal shares *per capita*. Had the participating issue included an infant, another question would have arisen; for an infant's interest under the Act (sections 46, 47) is contingent only. But here all possible claimants were adults, and it was therefore unnecessary to decide whether such contingencies should be imported into a gift to infant "relations". Nevertheless, it is significant that Clauson, J., expressed the view

that the changes wrought by the Act of 1925 ought not to alter, beyond strict necessity, the rule of convenience previously adopted.

Will—construction—pecuniary legacy—whether demonstrative or specific.—Re Webster, Goss v. *Webster* (1937), 156 L. T. 128, concerns a bequest "to F. E. W. the sum of £3,000 to be paid to him out of the share of my capital and loans in the business of Webster and Bullock . . .", with a proviso that, if F. E. W. become a partner in that business within six months from the testator's death, no part of the legacy should be withdrawn from the business until a year after the death. The testator was a partner in this business until he died, and the surviving partners had, by virtue of the partnership agreement, an option to pay by four quarterly instalments any moneys payable to a deceased partner's estate. It appeared likely that the deceased's share in the partnership would produce considerably less than £3,000. The question thus arose as to whether the deficiency should be met from the general estate of the testator or whether the legacy should abate. The Court of Appeal, reversing Farwell, J., held that it was a demonstrative, not a specific, bequest, and so was not limited to any moneys received from the business.

In construing the clause concerned, the Court was satisfied that the remainder of the will threw no light upon the matter, and that the opening words (quoted above) of the legacy ought to be construed as a direction that the legacy "be paid to him *primarily* out of the share", *i.e.*, as demonstrative. And, whereas Farwell, J., had read the proviso to the legacy as an indication that it was intended to be specific rather than demonstrative, the Court of Appeal was unanimous in holding that the proviso threw no light upon this matter. Lord Wright, M.R., adopted the test applied by Page Wood, V.-C., in *Paget* v. *Huish*, 1 H. & M. 663, 671, *viz.*, if the words show only that the testator preferred the legacy to be met out of the named fund it is a demonstrative legacy, but if they show further that he preferred the legacy should fail altogether rather than be thrown upon his general estate it is specific. *Ellis* v. *Walker* (1756), 1 Ambl. 309 (discussed in Roper on Legacies, vol. i, 4th ed., 201, 231), was distinguishable from the present case; for there the testator had added the words "if I do not draw it [the money] out of the trade before I die".

Donatio mortis causa—parting with dominion—conflict of laws. —The essential elements of a *donatio mortis causa* (an exception

to the provisions of the Wills Act, 1837) were discussed by Farwell, J., in *Re Craven's Estate, Lloyds Bank* v. *Cockburn* (*No.* 1), [1937] Ch. 423. The deceased, a British subject domiciled in England, who possessed certain moneys and securities in a bank at Monte Carlo, had given her son a power of attorney over this property. On July 15, 1935, being about to undergo an operation which might prove fatal, she told him to get the property transferred into his name, as she wanted him to have it in case anything happened to her. On July 18, he posted instructions to the bank to make the transfer. The bank wrote on July 20 that it had done so as to the moneys, and on July 22 that it had done so as to the securities. She died on July 20.

Apparently no question was raised as to whether the transfers had actually occurred before she died. The judgment is mainly concerned as to whether she had so parted with the dominion over the property as to prevent her from dealing with it in the interval between the *donatio* and her death. A power of attorney is insufficient; for it does not preclude the donor from dealing with the property. But "by procuring the transfer of the property into her son's name the testatrix did what was necessary in order to part with dominion" (p. 429). Moreover, although the property was situate in a country which does not (counsel, at p. 426) recognise a *donatio mortis causa*, the law of England applied; for it was a question of administration, in that her executors must raise it in getting in her assets, and the estate was being administered in England. The law of Monaco was applicable to determine whether there was an effective parting with dominion as to movables situate there, but on this point it does not differ from English law.

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4. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Exemption in favour of charities—Charities out of the United Kingdom.—The exemption from tax under Schedules C and D in respect of certain classes of income granted to charities by section 37 (1) (b) of the Income Tax Act, 1918, is not in terms confined to United Kingdom charities. It has, however, now been laid down that in order that the exemption may apply, the income

must be the income of charitable bodies or trusts established in the United Kingdom, this being the construction of the section adopted by Lawrence, J., in *C. I. R.* v. *Gull*, [1937] 4 A. E. R. 290. A testator had left the residue of his estate in trust for the benefit of certain charities in Canada. Three persons were named in the will as executors and trustees, and two of these persons were resident in the United Kingdom. One of these two had renounced probate, but the other had not and had in his hands, at the material times, certain investments representing a part of the residuary estate. In respect of the income of these investments exemption from tax was claimed under section 37 (1) (b). It was held by Lawrence, J. : (1) that the exemption applies only to the income of bodies of persons or trusts established in the United Kingdom, but (2) that in this case the trust must be considered to be established in the United Kingdom for the purposes of a section 37 claim, the facts being that of the three persons originally named as trustees two were resident in the United Kingdom, that one of them, being still resident in the United Kingdom, was in fact a trustee at the material times, and that the claim was in respect of income received in the United Kingdom by that trustee. Lawrence, J. referred in his judgment to the express provision made in the 1923, 1924, 1925 and 1926 Finance Acts for the exemption from tax of certain classes of income arising to bodies of persons or trusts established in the Irish Free State for charitable purposes only. Such provision would clearly be superfluous if, in the application of section 37 of the Income Tax Act, 1918, it made no difference whether the body or trust was or was not established in the United Kingdom. It will be observed that in *C. I. R.* v. *Gull* nothing turned on the fact that the charitable purposes themselves were purposes to be carried out in Canada, the decisive question being, not where the charitable purposes were to be carried out, but where the charitable trust was established.

Foreign dividends—Relief from double taxation.—In one of the earliest of the reported tax cases, *Gilbertson* v. *Fergusson* (1881), 1 T. C. 501, a question arose as to the tax position in respect of dividends paid by a non-resident company to persons resident in the United Kingdom out of profits which had in part already borne British tax. The principle there laid down was that the United Kingdom shareholders were entitled to relief from double taxation, and that principle has now been given a somewhat extended application in *Barnes* v. *Hely Hutchinson*, " The Times " newspaper, October 19, 1937. In *Gilbertson* v. *Fergusson* the

company paying the dividends was a foreign bank with a London agency. The United Kingdom profits had been duly subjected to British tax and the amount of the taxed United Kingdom profits for the period in question in fact exceeded the amount of the dividends receivable for that period by United Kingdom shareholders. On behalf of the United Kingdom shareholders it was contended that, in these circumstances, the dividends ought not to be taxed on their way to those shareholders through the London paying agent. The contention, in this form, was rejected on the ground that the dividends must be considered to be paid out of the entirety of the company's profits taken as a whole, so that the dividends payable to the United Kingdom shareholders could not be specifically attributed to the United Kingdom profits. But the contention succeeded to this extent—that it was held that the tax to be borne by the United Kingdom shareholders must be computed by reference to the fact that a part of the company's aggregate profits consisted of profits which had already borne British tax. What was actually decided was, as it was put by Cotton, L.J., that " duty is to be paid unless so far as it is shown that the dividend arises from or is payable in respect of profits made in the United Kingdom ". The exact method of computation to be adopted was not expressly prescribed, but the principle, as propounded by Brett, L.J., was that " in respect of so much of the dividend as is payable out of the profits from the business carried on in England, the income tax is to be paid, not twice, but only once ".

It has been necessary to deal at some little length with *Gilbertson* v. *Fergusson* as a necessary background to the decision in *Barnes* v. *Hely Hutchinson*, above. The material facts there were that the respondent, who was resident in the United Kingdom, had received a preference dividend (paid without deduction) from an Indian company, part of whose profits consisted of taxed dividends from certain English companies. It will be observed that the facts were not precisely parallel to those of *Gilbertson* v. *Fergusson*, one distinction being that here the non-resident company paying the dividend was not itself a company trading in the United Kingdom and taxable on its United Kingdom profits, but a company receiving taxed dividends from English companies. The respondent was not, therefore, a shareholder in a company which was itself directly liable to British tax on a part of its profits. It was, however, held by Lawrence, J., that this distinction was immaterial, as was likewise the distinction that the respondent was a preference and not an ordinary shareholder of the Indian company. The result of the appeal was that the

respondent was held not to be assessable under Case V of Schedule D in respect of 44.12 per cent. of his dividends from the Indian company, this being the proportion of those dividends which had been agreed between the Crown and the respondent to be attributable to the dividends received by the Indian company from the English companies.

Agreed payment on termination of service — Assessability of executors where service terminated by death.—Section 45 (5) of the Finance Act, 1927, provides for the method of computing the income assessable under Schedule E for the year in which a taxpayer ceases to hold an office or employment, and section 45 (6) goes on to provide that "in the case of the death of a person in whose case if he had not died tax would under the provisions of the last preceding sub-section have become chargeable for any year the tax which would have been so chargeable shall be assessed and charged upon his executors or administrators . . ." How do these sub-sections apply in a case in which X's tenure of an office has been terminated by death, and the office was held under a service agreement providing that on the termination of the service from any cause whatever (other than misconduct) a certain sum should be payable by way of remuneration to X or his personal representatives? This was the question which arose in *Allen and Murray* v. *Trehearne*, 16 A. T. C. 87. Since the service was in fact terminated by death, the terminal sum was never received or receivable by X himself. If, on the other hand, X had not died, the payment in question would not have been made, since the reason why it was payable was that he ceased to hold the office, and he ceased to hold the office by reason of his death. It was decided, nevertheless, that section 45 (6) of the 1927 Act applied so as to make the personal representatives chargeable to tax in respect of the terminal sum. That sum was payable under the service agreement by way of remuneration on the termination of the service. Section 45 (6) makes it necessary to inquire what the taxpayer's liability would have been under the cesser provisions of section 45 (5) if he had not died, and if X had not died he would have been chargeable in respect of all the emoluments of the office for the year in which the cesser occurred. In other words, if everything had happened as it did except that X had not died, he would have been chargeable in respect of the terminal sum, and the effect of sub-section 6 was (it was held) to impose a liability in respect of that sum on his executors.

[NOTE.—This decision is understood to be under appeal.]

5. *DEATH DUTY CASES.*

By L. J. Stein, Barrister-at-Law.

Succession Duty — Who is the predecessor? — The succession duty case of *Re Drake's Settlement Trusts* was noted in the September, 1937, issue of *The Conveyancer*, *ante*, p. 89. Since that note was written, Bennett, J.'s, decision, [1937] 1 A. E. R. 286, has been reversed by the Court of Appeal, [1937] W. N. 385. The facts of the case are summarised in the note above referred to and need not here be repeated. Disregarding immaterial details, the position was that an agreement to settle made between A and B in 1917 had been followed by a settlement made in 1921. In 1917 A had a vested interest in certain properties, subject to divestment in the event of his not surviving the War, in which event the property would pass to B. When the settlement was made in 1921, A, having survived the War, had a vested interest no longer subject to divestment, and B's contingent interest had ceased to exist. Bennett, J., decided that, in the events which had happened, the person, and the only person, out of whose estate the successors' interests were derived was A, who must, therefore, be treated as the sole predecessor. The Court of Appeal has now reversed the decision on the ground that the time for ascertaining the predecessor, or predecessors, was the time when the disposition was made creating the succession; that the material time was that of the making of the agreement to settle in 1917; and that in the light of the position existing at that time A and B must be regarded as joint predecessors.

THE LIBRARY.

The Law of Succession Testate and Intestate including the Administration of Assets and the Liability of Personal Representatives for Death Duties. By D. Hughes Parry, M.A., LL.M., of the Inner Temple, Barrister-at-Law, Professor of English Law in the University of London. London: Sweet & Maxwell, 3 Chancery Lane, and Stevens & Sons, 119 Chancery Lane. 1937. pp. xlvii + 311. Price 15s. net.

In rather less than three hundred pages Professor Parry has dealt concisely with the many aspects of the Law of Succession, citing a thousand cases and the relevant statutes. In such a compass detailed treatment of all the relevant topics is, of course, impossible; but the learned author has met this difficulty in great

measure by indicating where further information may be found. Some thirty references are provided to historical textbooks (mainly Holdsworth), several to periodicals, and a hundred or so to sundry modern textbooks (mainly Williams on Executors).

For its size, this is a surprisingly informative work, and many interesting practical points are included. This is particularly evident in the chapters on Grants of Probate and Administration (V, IX, X—62 pp.) and Administration of Assets (XIII—57 pp.); and the practical aspect is further apparent in chapters on the Property and Powers of Personal Representatives and their liability for Death Duties (XI, XII, XIV—63 pp.). There is also a chapter on Construction, though it does not go very far.

Considerations of space have led to some compression in places, *e.g.*, conditions and remoteness (5 pp.), modern rules of intestacy (8 pp.), secret trusts (mentioned but not discussed), also pp. 257, 261 (para. 1). But such difficulties can hardly be avoided with so large a subject; and one can feel nothing but admiration for the learned author's achievement in reducing its complexities to this handy and stimulating volume.

S. J. B.

THE LAW OF PARTNERSHIP. Thirteenth Edition. By Sir FREDERICK POLLOCK, Bart., K.C., D.C.L., of Lincoln's Inn. pp. xxvii + 269. 1937. London: Stevens & Sons, Ltd., 119 & 120 Chancery Lane, W.C.2. Price 10s. net.

This is the thirteenth edition of a legal classic—and the ill-omen in the fated number is not far to seek. The edition is the last of a series which, since 1877, have come from the same author's experienced pen. It is with the most sincere feeling of regret that one reads again the clear and concise statements of the law and realises that this great writer cannot prepare another edition of the book which has been a guide to the student and a friend to the practitioner. However, one is comforted by the fact that the greater part of the sheets of this edition were passed by the author before his death. We still have with us, therefore, the real "Pollock's Partnership"—until ruthless progress in half a dozen years relegates it to an inaccessible shelf. That is the tragedy of legal textbooks. Dickens, Scott, Thackeray and the rest have their public for ever; but few legal authors, however great their genius, have more than a fleeting "life"—though the sixty years of "Pollock's Partnership" must stand somewhere near the record.

The substance of the book is too well known to require detailed review. Part I (over half the text of the book) sets out the Act;

Part II deals with procedure in actions by and against partners and administration of partnership estates; Part III contains four valuable precedents. In Parts I and II the text of the Act and the Rules is accompanied by illustrations and discussion. The interesting preface to the twelfth edition, which is reprinted in this edition since the author's illness prevented his writing a new preface, discusses the use of Macauley's invention of adding authoritative illustrations to the enacting text of a code (as in the Indian Penal Code). But what is the need for the Legislature to undertake the selection and statement of illustrations to a code, when the work can be left to the private enterprise of such able writers as Pollock, who based his construction of this book upon statement of rule and explanation by example—with the addition of interesting comment and informative discussion.

"Pollock" is a student's book and was never intended to take the place of "Lindley". But every practitioner should ever be a student and with "Pollock" to lead the way he can readily discover the path out of any tangled undergrowth of partnership problems. Perhaps he may be justly aggravated by the lack of an index to statutes; by the fact that thirty-four pages of valuable space are devoted to limited partnership when they might have been better used upon further discussion of more practical matters; and by the omission, in dealing with the rule in *Kendall* v. *Hamilton*, of any mention of the very practical point that judgment in default or under Order XIV is no bar to further proceedings against other partners sued in the same action. But these facts will not detract from the value of the book and they will not deter the practitioner from replacing his old twelfth by this new thirteenth edition, which will remain as a memorial to the great author.

R. G. P.

Williams' Law and Practice of Bankruptcy. Fifteenth Edition. By John Basil Blagden, M.A., and John McLean Buckley, M.A., both of the Inner Temple, Barristers-at-Law. London: Stevens & Sons, 119 Chancery Lane, and Sweet & Maxwell, 3 Chancery Lane. 1937. pp. cli + 1096. Price £2 10s.

"Williams" has established itself as *the* standard work on Bankruptcy and no practitioner in bankruptcy can safely disregard consulting it upon the many difficulties that arise in practice. It is a compendium of the decisions which are given upon the subject. Bankruptcy law seems to retain one flavour of the penal character with which it began, namely, the tendency to construe strictly its

provisions. This emphasises the importance of decided cases and makes it imperative to refer carefully to the constantly increasing bulk of authority before any advice is given on many of the difficult questions of the Act, such as fraudulent preference.

The steady stream of cases every year makes frequent issues of this work necessary. The present edition, however, has an added importance from the intervention of the Legislature. The Law Reform (Married Women and Joint Tortfeasors) Act, 1935, has drastically altered the position of married women, whose changing economic status has materially affected their importance in this branch of the law. Furthermore, the County Courts Act, 1934, and the Rules thereunder have also come into being since the last edition. In view of the fact that most bankruptcy work is conducted in the county court the need for an edition incorporating these changes does not have to be emphasised.

The editors have also largely rewritten the notes to sections 40 and 41 on executions, and also on section 44 on fraudulent preference, one of the most difficult problems of bankruptcy, and much affected by the recent decision in *Peat* v. *Gresham*, [1934] A. C. 252. The notes on section 38 (2) (c) on reputed ownership and section 42 on voidable settlements have been rearranged and expanded.

The form of this book as a commentary upon the Statutes and Rules is so familiar that it calls for no direct attention. The reviewer may, perhaps, be allowed to express his regret that this type of work has been accepted as the standard. It places a wrong emphasis on bankruptcy law. Although bankruptcy was from its commencement in the sixteenth century based upon statute the Judges never confined its rules within the ambit of the legislation and many of the sections of the recent Acts are only a codified form of existing law built up without statute. This development of case law makes a more harmonious system than the disintegrating effect of adjudication upon individual sections promulgated by the Legislature. The principles of bankruptcy are more homogeneous than any commentary on an Act and Rules can make it, no matter how well the system of cross-reference may be applied. Nevertheless, since this method has been that sought by the practitioner it need hardly be said here that in "Williams" it is well done. Perhaps a suggestion might be made that a table of Rules as well as of sections might be made at the commencement of the book, to which might be added another table of Rules of Court. One of the many awkwardnesses arising from this character of work is the fact that the Rules have to be annotated separately from the sections to which they apply. A similar result is also

indicated by the extracts from a number of other Acts, such as the Land Registration Act, 1925, and Rules, the Moneylenders Act, 1927, and the Debtors Act, 1869, which find their place with suitable notes appended.

The Index has been rearranged and enlarged and with this mass of material the practitioner should find what he wants.

THE LAW OF TRUST ACCOUNTS. By WALTER STRACHAN, of Lincoln's Inn, Barrister-at-Law. Second edition. London: Sweet & Maxwell, Ltd. 1937. pp. lxvi + 234. Price 21s.

This work is not concerned with the form in which trust accounts are kept, but with the law governing apportionment principally between capital and remainder and appropriations. The law is expressed in the form of a digest with necessary notes and illustrations. Its learning and the difficulty of the subject may be shown from the fact that about 1,600 cases are cited. The subject is also affected by statutory provisions, and it may be suggested that a Table of Statutes would be a convenience in any new edition.

This edition is the first after the 1925 legislation and some of the provisions of that legislation, such as that concerning the position of repairs in connection with trusts for sale, have been some of the most frequently litigated sections in the statutes. It is perhaps unnecessary in a work of this character to say that full notice of these statutory provisions and the cases decided thereon has been fully taken.

There are numerous problems which arise in the administration of a trust, including those connected with what is comprehensively termed "waste", the conversion of wasting assets, provision of annuities, variation in investments, and appropriation of securities. With all these the author deals exhaustively in a form which enables him to state his conclusions briefly. This is not to say that doubtful issues are eluded. Where necessary difficulties are stated and practical propositions are advanced. The work, therefore, can be confidently recommended to all practitioners whose practice lies in the field of administration of trusts and winding up of the estates of deceased persons.

We have also received:—

THE SETTLED LAND ACTS. By J. C. ARNOLD, Barrister-at-Law. London: Sir Isaac Pitman & Sons. 1937. pp. xxii + 384. Price £1 5s. (To be reviewed later.)

A.B.C. OF COUNTY COURT PRACTICE. By C. W. AKASTER, Solicitor, assisted by F. W. BROADGATE. London: Sir Isaac Pitman & Sons. 1937. pp. xvii + 362. Price 12s. 6d.